



The Office of the Alaska Ombudsman is an independent and impartial investigative agency located in the Legislative Branch of Alaska state government. The ombudsman's powers and duties are defined in the Alaska Ombudsman Act at 24.55.

The Alaska Ombudsman investigates complaints against State of Alaska executive branch agencies. The ombudsman can investigate to determine whether an agency action is unfair, contrary to law, unreasonable, oppressive, arbitrary, inefficient, discourteous, based on a mistake of fact, or otherwise erroneous. The ombudsman may make public the findings and recommendations resulting from an investigation. If an ombudsman investigative report criticizes an agency or individual, the agency is given the opportunity to reply to the report. The agency reply is incorporated in the report.

The ombudsman investigates individual complainants to determine if they highlight systemic problems. In the following report, the ombudsman reviewed all complaints filed against the Department of Health and Social Services Office of Children's Services since 2000 to determine if OCS had a systemic problem in notifying case parties and relatives of events involving children in OCS custody.



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**FINAL INVESTIGATIVE REPORT  
Ombudsman Complaints J2008-0108 and J2008-0229**

**November 30, 2010**

*This report has been redacted to remove information that would identify the complainant and members of the family involved in this investigation.*

## **SUMMARY OF THE COMPLAINT**

On August 27, 2007, the Office of Children's Services (OCS) took emergency custody of a minor child, the Grandchild, and filed a petition for temporary emergency custody in the Superior Court, First Judicial District at Juneau. The court granted OCS's motion for temporary custody at the emergency hearing and scheduled the pre-trial hearing for November 20. The court set the adjudication hearing for November 27, 2007.

On August 30, 2007, OCS, through the Department of Law (Attorney General) mailed notice of the court hearings to the Grandparents, the Grandchild's maternal grandparents. The notice stated that the Grandparents were not required to be present, but could participate telephonically at the hearings by calling the court at the start of the hearing at a toll-free teleconference number provided in the notice.

At the pre-trial hearing held on November 20, 2007, the Attorney General requested a continuance for two months because OCS had only recently determined paternity of the child. The court granted the AG's request, rescheduled the pre-trial hearing for January 24, 2008 and the adjudication hearing for January 31, 2008. The Grandfather participated telephonically during the November 20, 2007 pre-trial hearing and asked why the hearings were being rescheduled. The Assistant Attorney General (AAG) informed the Grandfather that paternity had just been established and OCS needed time to work with the biological father before adjudication.

OCS did not provide written notice of the rescheduled pre-trial hearing held on January 24, 2008 to the Grandparents, as required by AS 47.10.030 (d) and 47.10.070(a).

On January 22, 2008, two days prior to the January 24, 2008 hearing, the Grandfather called both OCS and the Attorney General's office and informed staff members from both agencies that he would be phoning to participate in the hearing. According to the Grandparent, he spoke with an OCS supervisor who gave him a teleconference number to call to join the hearing. In contrast, the OCS supervisor stated that she advised him of the court hearing on January 24, 2008 and asked if he had the number to call. According to the OCS supervisor, he had the number already and "sounded like he was reading from a notice of the hearing."

On January 24, 2008, the Grandfather dialed the teleconference number at the time the hearing was scheduled to begin. However, the in-court clerk did not connect him to the hearing. The hearing continued without his participation. Neither OCS nor the Assistant Attorney General notified the presiding judge that the Grandfather had contacted them and indicated he would be calling in. The Assistant Attorney General did not request the in-court clerk to keep the conference line open to allow the Grandparents to access the hearing.

At the conclusion of the January 24, 2008 pre-trial hearing, the presiding judge dismissed the CINA petition and released the grandchild from OCS custody. On February 29, 2008, the court granted full physical and legal custody to the child's father during a related civil custody proceeding.

After unsuccessfully trying to participate in the January 24 pre-trial hearing, the Grandfather contacted Law and OCS to complain about his inability to testify. He also complained that OCS failed to inform him that they had sent the Grandchild to live with the father. During one of his calls, Assistant Attorney General (AAG) Carla Raymond, Section Chief of Department of Law's Child Protection section, told the Grandfather to file a complaint with the Ombudsman. On March 10, 2008, the Grandfather followed this suggestion and filed a complaint with the Office of the Ombudsman.

The ombudsman opened an investigation into the following allegations stated in terms to conform with AS 24.55.150, which authorizes the ombudsman to investigate complaints about administrative acts of state agencies:

***Allegation 1: Contrary to law: The Office of Children's Services failed to serve written notice of a CINA hearing on the grandparents of a child who was the subject of the proceeding.***

***Allegation 2: Unfair: The Office of Children's Services failed to notify the court of a grandparent's request to participate telephonically at a CINA proceeding.***

***Allegation 3: Contrary to law: The Attorney General's Office failed to serve written notice of a CINA hearing on the child's grandparents.***

***Allegation 4: Unfair: The Department of Law failed to notify the court of a grandparent's request to participate telephonically at a CINA proceeding.***

During the course of the investigation, the ombudsman added the following allegations against the Attorney General based on an additional complaint received by the Grandfather on September 5, 2008:

***Allegation 5: Contrary to law: The Attorney General's Office failed to timely serve a grandparent with a copy of a court motion requesting that the court re-open a closed CINA proceeding.***

***Allegation 6: Contrary to law: An Assistant Attorney General committed perjury during a CINA hearing when she testified that paternity of the minor child had not yet been determined.***

During the investigation the ombudsman, on her own motion per AS 24.55.120 added the following allegations against OCS based on a review of the agency's files:

***Allegation 7: Unreasonable: The Office of Children's Services failed to contemporaneously document telephone contacts with a grandparent as required by OCS P&P 6.8.1 and 6.8.2.***

***Allegation 8: Unfair: The Office of Children's Services failed to notify a grandparent of an OCS conference concerning their grandchild, where the grandparent expressed a desire to participate in the placement decision process.***

Ombudsman Linda Lord-Jenkins gave written notice of the investigation to OCS Director Tammy Sandoval and OCS Southeast Regional Children's Service Manager Ritchie Sonner on June 20, 2008, and to Assistant Attorney General Carla Raymond, Assistant Attorney General Jan Rutherford, and Assistant Attorney General Hanna Sebold on August 6, 2008, in accordance with AS 24.55.140. The ombudsman modified the original allegations in the notices during the course of the investigation.

Assistant Ombudsman Jennifer Christensen investigated the complainant's allegations and forwarded her report to the ombudsman. The investigative report includes summary information gathered by all ombudsman staff about other notice complaints filed against OCS. The ombudsman forwarded her preliminary findings and recommendations to both agencies on June 1, 2010. Acting Director Christy Lawton responded for OCS and Assistant Attorney General Carla Raymond responded for the Department of Law. Both agency responses are incorporated in this Finding of Record

\* \* \*

## **Ombudsman's Findings and Recommendations**

Based on the evidence developed during this investigation and for reasons more fully articulated in this report, the ombudsman found Allegations 1, 2, 7 and 8, filed against OCS, and Allegation 4, filed against Law, ***justified***. The ombudsman found Allegations 3 and 6, filed against Law, ***not supported***. The ombudsman found Allegation 5, filed against Law, ***indeterminate***.

The ombudsman proposed four recommendations to the agencies:

***Recommendation 1: OCS should conduct additional training for all OCS staff regarding relevant statutes, regulations, policy and procedures on notice requirements. OCS should add to its training program a component on statutory notice requirements.***

***Recommendation 2: OCS should review the relevant sections of its policies and procedures manual with the Attorney General's office regarding grandparent notice and revise it to accurately reflect the procedures that OCS staff must follow when serving written notice of court hearings, case conferences, and other related meetings to grandparents.***

***Recommendation 3: The Department of Law should be responsible for sending written notice of all CINA hearings to grandparents and other interested persons. OCS should continue with current policy and procedure requiring written notice of OCS conferences to parties, relatives and other interested persons.***

***Recommendation 4: OCS invested a great deal of time and money to bring the ORCA case management system to Alaska. The agency should reinforce with caseworkers that the system is not only a records-keeping tool but a tool to help save time in routine tasks – such as drafting notice letters to case parties. Now that OCS has had the ORCA system for a while, caseworkers should be reminded and perhaps retrained in using the ORCA labor saving functions.***

Office of Children's Services Acting Director Christy Lawton responded to the ombudsman's preliminary report in a letter dated July 2, 2010. Ms. Lawton did not dispute any of the findings of the ombudsman and stated that OCS recognized the systemic areas that needed work and attention in order to help ensure these types of issues do not reoccur in the future with other families. Ms. Lawton's response included information about an Action Plan being implemented by the agency in response to the ombudsman's proposed recommendations. OCS's Action Plan is further detailed in the Recommendations section of this report.

Assistant Attorney General Carla Raymond responded to the ombudsman's preliminary report in a letter dated July 2, 2010, received by the ombudsman on July 6, 2010. Law agreed with the ombudsman's preliminary findings concerning allegations 3, 5 and 6, but disagreed with the finding for allegation 4, requesting modification. Law accepted Recommendation 2 noting that Law and OCS have been working on policy revisions pertaining to the legal aspects of a CINA case, including notice policies and procedures. But Law rejected Recommendation 3 as further detailed in the ombudsman's Recommendations section.

After receipt of Law's response, the ombudsman revised recommendation three to read as follows and proposed a fifth recommendation to both agencies as further detailed in the ombudsman's Recommendations section of the report:

***Recommendation 3: The Department of Law should be responsible for sending written notice of all CINA hearings to grandparents and other persons entitled to notice. OCS should continue with current policy and procedure requiring written notice of OCS conferences to case parties, relatives and other persons entitled to notice.***

***Recommendation 5: Law and OCS should collaborate with members of the Alaska Court System CINA Court Improvement Committee and the Alaska***

*Legislature for proposed changes to the Alaska Rules of Court and Alaska statutes to ensure there are clearer and consistent procedures in place for the telephonic participation of non-parties in CINA proceedings.*

## **BACKGROUND**

On August 27, 2007, OCS filed an emergency petition for temporary custody of the Complainant's Grandchild as a Child in Need of Aid. The court held an emergency custody hearing that same day. The Grandparents attended telephonically during the emergency hearing.

At the August 27, 2007 hearing, the court determined that the Grandchild was a Child in Need of Aid and ordered that the child remain in OCS custody. The court set a status hearing for September 27, a pre-trial conference for November 20, and an adjudication hearing for November 27, 2007.

On August 30, 2007, Assistant Attorney General Jan A. Rutherford sent by certified restricted mail a copy of *Notice to Grandparents of Court Hearings* to the Grandparents. The notice provided the dates and times of the hearings and stated:

[If] you live out of town and cannot appear in person, you may be present by calling the court at the start of the hearing at the toll-free teleconference number 1-866-247-6847 and when prompted, enter this conference code followed by the # sign. If the court has already signed on, you will be asked to identify yourself and press #. If the court has not yet signed on, you will be asked to wait and be put on hold; when the court is ready, you will be prompted to identify yourself and press #.

According to the Grandfather, and as verified by the investigator, this was the only written notice of the CINA hearings sent to the Grandfather and his wife by either agency.

## **Paternity Testing and Establishment**

On August 29, 2007, Department of Law paralegal Vicki Houtary forwarded a blood sample obtained from the Father to Laboratory Corporation of America (LabCorp) for paternity testing. On September 17, she forwarded to the lab blood samples taken from the Mother (the child's mother) and the Grandchild. On October 4, 2007, LabCorp concluded that the Father was the Grandchild's biological father with 99.99 percent probability.

On October 10, 2007, OCS caseworker Julia Harbers faxed the results to Assistant Attorney General (AAG) Jan Rutherford as verified by a fax coversheet contained within OCS's files. On October 12, 2007, the Attorney General's office also faxed the results to OCS as verified by a fax header appearing on the test results contained within OCS's files.

On October 12, 2007, Ms. Harbers told the Mother that paternity had been established for the Grandchild and that she would contact the Father to see if he wanted visitation. Ms.

Harbers called the Father the same day. The Father stated that he wanted custody of his child and did not want her to stay in foster care.

On October 12, 2007, the Attorney General's office faxed the results of the Father's criminal background check to Ms. Harbers. No concerns were noted about these results in either agency's files. According to the investigator's review of this information, the Father was convicted of selling alcohol to an intoxicated person in 1996 (a criminal misdemeanor) and a DWI in 1984. He also was charged with a DWI in 1991 and 1999, and sale of alcohol to a minor in 1994. However, these charges were dismissed. While the two charges the Father was criminally convicted of are not insignificant, the ombudsman concluded after reviewing this information that they would not preclude OCS from placing the Grandchild with him.

On October 16, 2007, Ms. Harbers contacted the Father and requested his parents' contact information in order to notify them of the CINA court proceedings. According to the ORCA notes entered by Ms. Harbers documenting this contact, the Father requested that she not contact his parents. Ms. Harbers said that she would contact the Attorney General's office with his request.

On October 17, 2007, Ms. Houtary e-mailed AAG Jan Rutherford and Ms. Harbers:

[The Father] called concerned about his elderly parents receiving grandparent notice; they are in their 80's & he was concerned about the impact of their health if they receive notice. I told him I would pass on those concerns to you; and **it was just that we provide grandparent notice due to past issues of grandparents upset about never receiving notice** – (Emphasis added).

The Attorney General's office honored the Father's request. The only written notice of hearings sent by either agency was the August 30, 2007 notice sent by the AG's office to the Grandparents.

On October 29, 2007, Ms. Harbers and her supervisor Jeannie Arledge discussed both parents' visitation schedules with the Grandchild. OCS approved supervised visitation between the Father and the Grandchild twice a week for one hour at each visit.

On October 30, 2007, the Grandfather called Ms. Harbers requesting an update on the case. Ms. Harbers' ORCA entry summarizing this contact indicates that she provided general information concerning his child's progress and interactions with The Child, but did not disclose any additional information due to confidentiality.

On November 5, 2007, Ms. Harbers requested from the Department of Public Safety a criminal background check on the Father's domestic partner.

The first supervised visitation between the Father and his child (the Grandchild) occurred on November 1, 2007. A second supervised visit took place on November 5, 2007. The ORCA notes indicate that the visits went well and that the Father interacted appropriately with the child. The CASA, John Gaguine, supervised the November 5, 2007 visit and stated in an e-mail sent to Ms. Harbers on the same date that supervised visitation was unnecessary in his opinion. On November 7, 2007, the Father participated in an additional supervised visit with The Child. A visit scheduled on November 14, 2007 was cancelled because the child was sick, according to the caseworker's notes.

On November 15, 2007, Ms. Harbers inspected the Father's residence. Following the inspection, Ms. Harbers approved the Father's home for further visits with the Grandchild.

### **First Request to Open Court Phone Line**

On November 17, 2007, AAG Jan Rutherford sent the following e-mail to Guardian Ad Litem Janine Reep, CASA volunteer John Gaguine, OCS caseworker Julia Harbers, AAG Hanna Sebold, and OCS Supervisor Jeannie Arledge:

Janine, John & Julia (cc Hanna & Jeannie),

As most of you know, I am leaving town tomorrow for a week, so Hanna will be attending the pre-trial on Tuesday in my place. At that hearing, I want Hanna to ask the court to continue the adjudication hearing for two months. (I'll be out of the office 1/17-1/25, so I would prefer the hearing to be the week of 1/28 (or before 1/17).)

I spoke with [the Father] last night and explained this to him, and I'm e-mailing Rob as well. [the Father] will be out of town next week as well, so I gave him the call-in number . . . **(Don't forget to open the line for him!)** [The Father] has no objection to this plan. He would like to meet with you all as soon as he gets back to set up a visitation schedule (I know you all want this too).

On November 20, 2007, the court held a pre-trial hearing. The Grandfather participated in the hearing, phoning into the hearing approximately four minutes after the start of the hearing. AAG Hanna Sebold attended the hearing, filling in for AAG Jan Rutherford during her absence from the office. Also present were Ms. Harbers, GAL Janine Reep, Robert Meachum, the Mother's attorney, and the Father.

During the November 20, 2007 hearing, Ms. Sebold requested a continuance for two months and testified that paternity had just been determined on October 4, 2007, and that the Father was the child's father.

During this hearing, Superior Court Judge Phillip M. Pallenberg addressed the Grandfather and provided him with information concerning the rescheduling of the pre-trial conference and the adjudication hearing. The Grandfather questioned Judge Pallenberg about the reason for the delay. Judge Pallenberg deferred to Ms. Sebold, who then explained the reasons for the delay as follows according to the investigator's review of the audio recording from this hearing:

**[The Grandfather]:** What is the reason for the delay sir?

**Judge Pallenberg:** Ms. Sebold...?

**AAG Sebold:** Information has just been provided to me. Paternity was just established. More efforts with the father need to be made before adjudicating.

**[The Grandfather]:** Got you.

At the conclusion of this hearing, the pre-trial conference was rescheduled for January 24, 2008 at 1:30 p.m. and the adjudication hearing was rescheduled for January 31, 2008 at 9:00 a.m.

On November 26, 2007, Ms. Harbers participated in a telephone conversation with AAG Rutherford and GAL Janine Reep. According to Ms. Harbers' notes from this teleconference, Ms. Reep and Ms. Rutherford requested that unsupervised home visits begin between the Father and the Grandchild as soon as possible. No meeting was required according to Ms. Harbers' notes. Ms. Harbers agreed to contact the foster parent and the Father to set up the new visitation schedule. According to Ms. Harbers' notes, the first unsupervised visitation between the Father and the Grandchild occurred on the same date, and went well according to reports received from the Father and the foster parent. Ms. Harbers noted that the visitation schedule with the Father would be daily from 5-7:30 p.m., Monday through Friday for two weeks, then adding weekends and overnights.

On November 26, 2007, Ms. Harbers also completed a registered sex offender search on the Father's girlfriend, the Mother, and the Father. The agency files do not note any concerns regarding the search results. According to OCS's files, OCS provided the results of the Father's criminal history search to the court on November 26, 2007.

In a telephone conversation on November 27, 2007, Ms. Harbers referred the Father to Catholic Community Services for in-home assistance and parenting support.

Ms. Harbers visited the Father at home on December 6, 2007. During this home visit, Ms. Harbers discussed increasing the Father's unsupervised visitation with the Grandchild to include weekend visits, with overnight visitation starting the following weekend.

### **OCS Does Not Notify Complainant About Conference**

On December 19, 2007, a Family and Children Early Conference (FACE) was held. OCS gave notice of the conference to all parties on November 30, 2007. However, OCS did not give notice of the conference to the Grandfather, according to a review of OCS's file, and as confirmed by the Grandfather. The conference participants included the child's parents, GAL Janine Reep, CASA John Gaguine, the foster parent, Community Representative Michelle Rogers, and OCS employees Julia Harbers, Sharon Fleming and Karilee Pietz. According to Ms. Pietz's notes from the conference, visitation with the Father was going well and occurring on a daily basis. The Mother's visitation with her child (the Grandchild) was notably inconsistent. According to the investigator's review of the OCS file, while the Mother was scheduled for daily supervised visitation with the Grandchild at Catholic Community Services, she frequently did not show up for the scheduled visits and failed to contact OCS to reschedule any missed visits. Her contact with the Grandchild during this timeframe was sporadic. Ms. Pietz's notes stated that the goal for the Grandchild was reunification with her father, a goal supported by CASA Gaguine, GAL Reep, and the Mother. According to Ms. Pietz's notes, attendees discussed the date of the next court hearing, January 24, 2008.

Ms. Harbers sent an e-mail to the Father following this conference with an updated visitation schedule for the period of December 21, 2007-January 2, 2008. According to this e-mail, the Grandchild was to live with the Father permanently beginning January 4, 2008. Ms. Harbers scheduled an in-home visit with the Father on January 9, 2008, but the

visit appears not to have taken place until January 15, 2008 according to Ms. Harbers' notes. The visit went well according to Ms. Harbers' notes.

On January 16, 2008, Sharon Fleming e-mailed Jan Rutherford, Janine Reep, and Julia Harbers concerning the upcoming January 24, 2008 hearing:

Hello all—

Another fun group e-mail! It seems that there are two opinions out there about the upcoming court hearing for the [Grandchild] case. Are we thinking about dropping custody of [the Grandchild] or extending custody? According to Julia, the father has not yet [the Grandchild] filed for civil custody yet and I am unclear why not. . . Are we extending or are we dropping? Or does it depend upon if the civil paperwork has been filed? And if it hasn't been filed yet and the father contests us being involved, then what? . . .

Julia Harbers responded via e-mail at 2:06 p.m. that the Father had filed the civil custody paperwork that day.

AAG Jan Rutherford responded by e-mail to Sharon Fleming, Julia Harbers, Janine Reep, and Hanna Sebold on January 16, 2008 at 3:43 p.m.:

I will not be at the pre-trial hearing on 1/24 at 1:30 p.m. (Hanna will do it for me). I have a call in to the court to find out which judge was assigned to the case – if it is Judge Pallenberg, we could schedule both cases on the 24<sup>th</sup> and then dismiss custody. If not, I propose a short continuance (30-60 days) while the visit case gets going, or at least leaving it on the calendar until the adjudication hearing to allow a hearing to be set . . .

Ms. Rutherford sent a subsequent e-mail the same day at 3:54 p.m.:

Update: The case # is 1JU-08-380 CI and it's been assigned to Judge Pallenberg, so I've asked to have it before the court on 1/24 at 1:30 as well. I'll file a motion to dismiss and leave it to the judge and you all as to when it should be signed.

### **Complainant Tells OCS He Wants to Testify at Hearing**

The following evidence is in dispute. The Grandfather told the ombudsman investigator that on January 22, 2008, he informed OCS Social Worker Sharon Fleming and that he wished to testify at the hearing scheduled for January 24, 2008. The Grandfather said that Ms. Fleming replied that he could do so and that she provided him with the telephone number to call. In contrast, Ms. Fleming has stated in an April 23, 2008 e-mail to OCS Regional Supervisor Ritchie Sonner that the Grandfather already had the number to call and sounded like he was reading from an earlier notice during the telephone conversation she had with him on January 22, 2008:

I have had two conversation [sic] with [the Grandfather]. The first one was on 11/27, right after my return. I was unfamiliar with this case and basically just listened to him and advised that I would check about his

concerns. I talked about this with someone about this [sic] and was told that the plan was to reunify with dad and that we were moving towards this fast.

My next conversation with him was on 1/22/08, after we have reunified. No one had told him that we had reunified and so I told him that. I advised him of the court hearing (1/24) and asked if he had the phone number to call into. He had it and it sounded like he was reading from a notice of the hearing, but it could be that he got the phone number from a different source. He told me that he planned on calling in to the hearing.

I just spoke with Julia and she said that all of her contacts with [the Grandfather] are in ORCA. **I refrained from putting mine in ORCA because they were so contentious and I was just letting him vent.** I tried, unsuccessfully, on our second conversation to explain that father's have rights and he cited for me CO [Colorado] and CA [California] laws and just became angrier.

I can put this in a different format if you'd like but this is the extent of my contact with him. (Emphasis added).

The ombudsman investigator confirmed that Ms. Fleming failed to document in ORCA the two conversations she had with the Grandfather on November 27, 2007 and January 22, 2008. Ms. Fleming wrote the above e-mail summary in response to the ombudsman's investigation several months after her contacts with the Grandfather.

On January 22, 2008 at 1:54, Ms. Houtary e-mailed OCS worker Julia Harbers, OCS Supervisor Sharon Fleming, AAG Jan Rutherford, and AAG Hanna Sebold:

Subject: pre-trial/grandfatehr [sic]

HEADS UP! I wanted to give you a heads up regarding [the Grandchild's] case. Maternal grandfather [Name and phone redacted by Ombudsman] called extremely upset, giving me an earful; about not being able to get return calls from ocs, about leaving messages and no one calling back; people being on vacation, about not being kept up to date on this case, and no one communicating with him on a regular basis. [He also let me know he sued California agency regarding the adoption of mom in this case & said perhaps ocs should be investigated for not communicating with grandparents] He further went on to express that placement with the dad is an "abomination" that this guy is 'single, has women in and out of his life', and is "not qualified to be a father" [based on one phone call – wherein dad at the time, was not confirmed to be the father]. He said we were not putting the child's safety first by placing with Dad. I assured him children are not placed willy-nilly, that PARENTS have first placement rights, and everthing [sic] is carefully considered, and so forth. He was further annoyed grandparents do not have party status, and on and on.

Anyway, he will be calling in for the pre-trial on 1/24 & will likely want to unload on the judge!?

Ms. Fleming responded on January 22, 2008 at 2:05 p.m.:

Yes, I was the one who gave him the news that the ‘birth male’ (his really weird term for bio fathers) has [the Child]. I got an earful, too. I let him vent and told him that fathers do have rights and we’re not in CO or CO [sic]. I guess his plan was to have the people in CO who adopted [the Mother’s] other child to adopt [the Child]. I told him that fathers have rights in AK. I am sure he will be contesting this decision and told me that he could not believe we placed without a judge’s order.

I spoke with him once and have not received any more calls from him until today. He has not left any messages for me.

Should be fun!

Ms. Houtary responded at 2:15 p.m.:

Thanks Julia – just to keep all our bases covered, in ALL our case, when grandparents contact ocs – we are obligated to keep in communication with them about hearings:

- Grandparent:

1. A child’s grandparent has the right of advance written notice of all court hearing in the child’s case if:

- A. the grandparent has contacted the division provided evidence acceptable to the division of being the child’s grandparent, requested notice of hearing in the child’s case, and provided the division with a current mailing address; or

- B. division staff is aware of that the child has a grandparent and has the grandparent’s mailing address on file. . . .

4. Unless the worker is aware of (or becomes aware of) and has documentation of that one or both of the situations under 3 applies, the worker will assume that the grandparent has the right to notice.

- 5. Notification:**

- A. If notice is required, the worker will provide the grandparent’s name and address to the OCS designated administrative clerk who will be responsible for notifying the grandparent (see section 6.6.3 Notification of Court Hearings and Case Conferences).**

- B. If the worker receives documentation of a conviction of crime against the child or court order prohibiting contact, the worker will inform the OCS designated administrative clerk that notification should cease.**

- 6. Grandparents who are entitled to notice are entitled to be heard at the hearing, but the court may limit the presence of the grandparent if:**

- A. it is in the best interest of the child; or**
- B. it is necessary to protect the parties' privacy interests, and it will not be detrimental to the child to do so.** (Emphasis in original).

Ms. Fleming responded at 2:17 p.m.:

I sent the previous e-mail, Vicky. As far as I know the grandparents were notified about the hearings. Are we obligated to tell them about anything else?

Ms. Houtary replied at 2:25 p.m.:

Not that I know of! Jan worked on the legislation for this – I think technically all they need is hearing dates/times

Ms. Harbers responded at 4:02 p.m.

I have talked to the grandfather on 2 occasions and haven't received messages demanding a return call since that time.

Thanks,

Ms. Fleming e-mailed Vicki Houtary individually at 5:24 p.m.:

Do you know, Vicki, if we are obligated to get them a copy of the case plan? This came up today as well. Thanks.

Ms. Houtary's e-mailed response to this question was not contained within the materials provided to the investigator by either OCS or the AG's office.

### **Grandparents Unable To Call In To Hearing**

On January 24, 2008, Ms. Harbers, AAG Sebold, the Father, his domestic partner, and the Mother's attorney, Rob Meachum, attended the rescheduled pre-trial hearing in Juneau Superior Court.

The Grandfather told the investigator that he and his wife attempted to call into this hearing to testify by calling the telephone number he asserts Ms. Fleming gave him during their January 22, 2008 conversation. He further said that they were placed on hold indefinitely and were never connected to the hearing.

At the conclusion of the pre-trial hearing held on January 24, 2008, the court granted OCS's motion to dismiss the petition for custody of the Grandchild and released the Department of Health and Social Services from all responsibility for the child.

According to Ms. Harbers notes from this hearing:

Pre-trial hearing today with Judge Pallenberg. Present: Hanna Sebold filling in for Jan Rutherford (out of town), Janine Reep (GAL), Rob Meachum (attny [sic] for [the Mother] who was a no show), [the Father] and [his Girlfriend] present in court. [The Father] wants full custody of [his Child, (the Grandchild)] and has offered [the Mother] visitation but [the Mother] has not followed through with visitation according to [the Father]. Rob M. state he has not had significant contact with [the Mother]

and has no opposition to oral motion to dismiss petition. GAL Janine Reep stated that [the Mother] told her that she was “happy with [the Grandchild] being placed with [the Father]” and there is no opposition to the state releasing custody of [the Grandchild] to her father . . . Judge Pallenberg granted motion to release custody to [the Father]. 1/31/08 court hearing is taken off the calendar.

On January 24, 2008, the Grandfather contacted the court and spoke to Keitha Kolvig, administrative assistant to Judge Pallenberg. According to the Grandfather, he expressed his frustration to Ms. Kolvig on not being able to testify telephonically at the January 24, 2008 hearing.

In response to the Grandfather’s call, Superior Court Judge Phillip M. Pallenberg, wrote a letter to the Grandfather dated January 28, 2008 (cross-copying all parties) acknowledging Mr. Grandfather’s call and inability to participate telephonically in the January 24, 2008 hearing. As Judge Pallenberg stated in his letter:

Because of the great distances in Alaska, we routinely allow people to participate in court hearings by telephone. The court has a conference line which we use for these types of hearings. The court does not automatically call in to the conference line for every hearing, however, unless we are advised in advance of the hearing that someone wishes to participate by telephone. We do not call the conference line for each hearing just to check and see if someone is there.

For that reason, if someone wishes to participate in a hearing by telephone, they are required to make arrangements with the court in advance of the hearing for telephonic participation. **Because no one advised the court that there was anyone wishing to participate in the hearing today by telephone, the clerk did not call the conference line.**

As a grandparent, you are not considered a party to this case, so there is no legal requirement that you be present for hearings. If you have any further questions about this case, you may want to contact your child’s attorney or the Office of Children’s Services. (Emphasis added).

On January 29, 2008, AAG Section Chief Carla Raymond contacted OCS Children’s Service Manager Ritchie Sonner and informed her that she received a phone call from the Grandfather and she requested Ms. Sonner follow up with him. According to Ms. Sonner’s notes, Ms. Raymond said that the Grandfather was upset because OCS had placed the Grandchild with her biological father and that they had closed the case without telling him.

Ms. Sonner phoned the Grandfather on the same date and they spoke for approximately 45 minutes, according to Ms. Sonner’s notes. Among other topics of concern, the Grandfather raised the issue of his unsuccessful attempts to participate in the January 24, 2008 hearing. He said that he called the phone number he was given by Sharon Fleming, was put on hold for 15 minutes, hung up and called again, and was told by a person who answered the phone that he had missed the hearing and the case was dismissed. Ms. Sonner states in her note entry on January 29, 2008:

I also expressed to him my regrets that he was unable to participate in the court hearing, despite his efforts to phone in. I told him that I would look into that, because I wanted to make sure he had the opportunity to be heard, and I wanted to make sure this wasn't a flaw in our system.

On January 30, 2008 at 12:23 p.m., AAG Hanna Sebold e-mailed Ritchie Sonner:

. . . Also, you asked a question about [the Grandchild's] grandfather, Jan's case, wanting to 'have his day in court' regarding our release. You may want to speak with Jan, but in a nice way, it's fair to explain to grandpa he is not a party and doesn't have standing to contest this. I believe grandparents may request visitation in civil court and that may be the way he needs to proceed. **I do not remember if I asked for the phone line to be opened.** (Emphasis added).

Ms. Sonner responded to AAG Sebold's e-mail at 1:38 p.m. as follows:

. . . As for the [redacted] grandfather, he states he attempted to call in, was put on hold, and never included in the court hearing, and had some things he wanted heard by the court. I had 2 specific questions about this, one of which I think you answered below, and that was, should I tell him to send a letter to the court, containing what he wanted to state at the hearing. The other question is do we have the systems in place so this doesn't continue to happen with callers.

AAG Sebold responded to Ms. Sonner's e-mail at 1:50 p.m.:

Well it's a mixed bag. **I don't remember if I asked to have the phone lines open, but the in-court is also supposed to open the lines so sometimes I just assume they are opened.** I can try to remember to ask, but with the father there, the mother having received notice and not showing, my focus were [sic] on the actual parties. Best we can do is be more vigilant, but it is the court's phone system. (Emphasis added).

AAG Carla Raymond contacted Ritchie Sonner again on February 19, 2008 and left a message stating that the Grandfather had called her and asked that Ms. Sonner call him back. Ms. Sonner contacted the Grandfather on February 20, 2008. The Grandfather again expressed his frustration to Ms. Sonner about being unable to participate at the January 24, 2008 court hearing, in addition to several other concerns regarding the biological father. Ms. Sonner said that she would send the Grandfather information on writing a letter to the court expressing his opinion. Ms. Sonner followed up with an e-mail to the Grandfather at 12:52 p.m. February 22, 2008, providing him with an address to send a letter to the court:

good morning [Grandfather's name redacted by Ombudsman] .

as per our phone conversation, here is the mailing address so you can send a letter to the court expressing your input regarding [the Child's Mother], and your frustration over your unsuccessful efforts to participate in the 1/24/08 court hearing via the telephone.

Alaska Superior Court  
First Judicial District  
Box 114100  
Juneau AK 99811-4100

And I will be talking with our staff about 1) random, unannounced visits to the birth father's house, 2) background check on the birth father's girlfriend. Your suggestion that we conduct a search of the Father's computer is something that is out of our scope.

Thank you for taking the time to share with me your insights and concerns about [the Grandchild].

On February 25, 2008 at 2:13 p.m., the Grandfather sent the following e-mail to AAG Carla Raymond:

Dear Ms. Raymond,

Thank you for your help regarding our [Grandchild] . . . Richie Sooner has been in contact with me and is headed in the right direction. She asked my wife and I to write to the judge about the failure to have the tele conference open so we could testify and the fact we did inform Children's Services about our intent to be in attendance. We will send a copy of this letter to you.

Would it be beneficial to copy Governor Sarah Palin regarding this matter?

I am looking forward to your answer.

Ms. Raymond responded at 6:42 p.m. on the same date as follows:

Mr. [Grandfather],

I'm glad that you have been able to speak with Ms. Sonner. I also glad to hear that she could offer you other action suggestions. Please do send me a copy of the letter for my own files. Also, you'll note that I have cc'd Jan Rutherford with this correspondence. She is the Deputy Chief Assistant Attorney General for the child protection section and the attorney of record as well. With respect to your question about sending correspondence to Governor Palin's office, I'm afraid I can't speak to what action her office might take, if any. In my experience, Governor Palin welcomes correspondence on any issue people feel important. If you were to contact them, I feel confident they will be as helpful as they can be under the circumstances.

On February 26, 2008, the Grandfather responded in writing to Judge Pallenberg's January 28, 2008 letter:

On January 22, 2008 at 3:49 p.m. CST, I informed Sharon Fleming of Child Protective Services that we wanted to be in court to testify about the information we have regarding the birth father in this case. Ms. Fleming informed me during the conversation that the birth father had custody of the baby, which was a surprise to us. I [Grandfather] asked Ms. Fleming if we could testify in this case because we have information no one could possibly have in this matter. Ms. Fleming stated that we could testify. Ms.

Fleming had enough time to inform the proper authorities that we wanted to testify. Failure by Ms. Fleming to inform the proper authorities is a huge failure in the system that may have placed our grandchild in danger. .

..

This action also demonstrates a breakdown in communications by the Office of Children's Services, the Court and those involved.

In your letter to us, you stated that grandparents do not have any legal standing in this case. . . we were involved from the day we found out the baby was placed in the care of Child Protective Services. . . Grandparents who care about children and their safety can be a valuable asset to the courts and social services. Please do not devalue or discount our abilities and knowledge to help in your efforts to protect children.

On February 29, 2008, Judge Pallenberg granted the Father sole legal and primary physical custody of The Child, with the Mother to retain reasonable visitation at the Father's discretion in the civil custody matter.

The Grandfather filed a complaint with the ombudsman on March 10, 2008.

On August 15, 2008, after learning that the Grandfather had filed complaints with the ombudsman, AAG Rutherford filed a motion with Judge Pallenberg requesting a hearing in either the CINA case or the related civil custody case. The hearing would give the Grandparents "an opportunity to present information to the Court, an opportunity to which they are entitled by law and which they were prevented from exercising through no fault of their own." To date, the court has not ruled on this motion. The Attorney General's office has not filed any further motions with the court and both court cases remain closed.

## **INVESTIGATION**

As part of the investigation, the investigator interviewed:

- The complainant, who is referred to as the Grandfather;
- Clerk of Court Sharon Heidersdorf;
- AAG Carla Raymond;
- OCS Southeast Regional Supervisor Ritchie Sonner; and
- Central Mail Services Manager Brad Witt.

The investigator also reviewed both agencies' case files and the court files for both the CINA and civil custody proceedings. The investigator also reviewed all e-mail communications received from or sent to the complainant by OCS staff, and all e-mail communications that were exchanged between OCS, the Grandfather, the Attorney General, the Guardian ad Litem, and the court system concerning his request to testify.

The investigator also reviewed relevant Alaska Statutes, Alaska Administrative Codes, Alaska Court Rules, and OCS policies and procedures, as further cited in Appendices A and B attached.

## **Ritchie Sonner, OCS Southeast Regional Manager**

The ombudsman investigator interviewed OCS Southeast Regional Supervisor Ritchie Sonner on April 21, 2008.

According to Ms. Sonner, the Grandfather told OCS that he wanted to testify at the January 24, 2008 hearing. She said that the Grandfather's inability to testify was partially OCS's fault and partially the AG's fault. She said that she found out about the incident after the fact. In response to his complaint and contact with her on January 29, 2008, she checked with the OCS supervisor, Sharon Fleming, and with the Attorney General's office. According to Ms. Sonner, staff in the AG's office told her it was the Attorney General's mistake that the Grandfather was unable to call through to the hearing. She did not name the staff.

Ms. Sonner said she suggested to the Grandfather that he write a letter to the judge and send a copy to her. She said she was not familiar with how the court works and what happens. However, she said grandparents are not considered a party to the case and have a little less weight as a witness. She also stated that the Grandfather had telephonically attended a prior hearing where the court verbally scheduled the January 24, 2008 hearing. She stated she was aware that the Grandfather was put on hold when he tried to access the January 24 hearing telephonically. She described this as a court issue and not an OCS issue.

Ms. Sonner said OCS has the responsibility to notify grandparents of the court hearings and to notify the Attorney General if a grandparent chooses to testify telephonically. She also stated that the Attorney General's office told her that it was partially the Attorney General's responsibility to say aloud to the court that the Grandfather wanted to testify but that the Assistant Attorney General was not aware that he wanted to testify. She conceded that the social worker who attended this hearing probably should have told the court that the Grandfather intended to phone in. She said that the problem encountered by the Grandfather was a rare "calamity of errors." She was unsure what options were available to the Grandparents now, other than writing a letter to the judge which he had done.

Ms. Sonner said she did not know what OCS could do to prevent a recurrence other than educating caseworkers that they have an obligation to notify the Attorney General's office of a grandparent's desire to testify at the hearings. She commented that the issue of notice probably needed to be better addressed in OCS policies.

A review of OCS's files makes clear that the Grandfather had contacted the Attorney General's office on January 22, 2008 and spoke to paralegal Vickie Houtary. On the same day, Ms. Houtary e-mailed AAG Sebold, AAG Rutherforddale, OCS supervisor Fleming, and OCS caseworker Harbers notifying them of his contact. A series of e-mail communications between these staff members ensued. Ms. Houtary, Ms. Sebold, Ms. Rutherforddale, Ms. Fleming, and Ms. Harbers had knowledge that the Grandfather intended to phone in to the January 24 hearing because they received these e-mails. Despite this, neither Ms. Harbers nor Ms. Sebold, who attended the January 24 hearing, notified the court of the Grandfather's intent to testify.

The investigator contacted Ms. Sonner again on May 27, 2008 requesting copies of any written notice of hearings sent to the Grandparents, as they were not contained within OCS's file materials. Ms. Sonner responded in an e-mail that OCS does not normally keep copies of these notices, and that she found none in the OCS files. She said that she sent a request for notices to the AG's office because notice to grandparents of the first hearing always comes from them.

On June 9, 2008, Ms. Sonner e-mailed a copy of the only grandparent hearing notice that went out. She wrote:

[w]e can't find the notice for the January hearing. We do know that the Grandfather was informed of the hearing verbally (although I realize that does not meet the requirement.)

On June 19, 2008, the investigator sent Ms. Sonner an e-mail asking for additional information concerning OCS Policy & Procedure 6.6.3 which states that an OCS designated administrative clerk is to provide written notice to grandparents at least 10 days before the date of any scheduled hearings. The investigator asked Ms. Sonner how OCS complied with this policy. Ms. Sonner responded by e-mail on June 26, 2008:

The answer to your question depends on which OCS office, because some have access to clerical support, and many do not. For this specific complaint I am assuming you are inquiring about the Juneau field office.

In Juneau, the notice is supposed to be initiated by the social worker assigned to the case. Each month they are expected to review the next month's court hearing schedule for their cases, determine who should receive a written notice, and either the worker sends the notice, or they delegate to the administrative clerk.

The AG's office also sends written notice, for all initial custody hearings, and for all termination trials. In recent communication with them, I've learned that they are also sporadically sending out notices for other hearings, but there doesn't seem to be a predictable pattern.

In all cases, the next hearing date is scheduled in the court room during a hearing. In this case, the January hearing date was set at the November hearing, and the grandparents were present at that time. In a conversation with the Grandfather about 10 days prior to the January hearing, he acknowledged that he knew about the hearing, and that he intended to participate. I recognize that we failed to provide written notice, but we know for sure that he was informed of the hearing date and time.

**Carla Raymond, Section Chief Child Protection, Department of Law**

On July 23, 2008, the investigator contacted AAG Section Chief Carla Raymond and requested copies of all Department of Law policy and procedures that pertain to the notification procedures applicable to grandparents. Ms. Raymond responded by telephone on July 30, 2008 that Law had no specific or general policy and procedure that addressed this issue. She said that her agency sometimes creates instruction sheets for new staff, as an example, notices sent in an Indian Child Welfare Act case due to its complexities.

However, there was no need for an instruction sheet for notice to grandparents because according to Ms. Raymond it is very straightforward and did not seem to be confusing.

Ms. Raymond said that the Attorney General's office sends out the initial hearing notices to grandparents, when contact information is available. She said that Law has the responsibility to send out the first notice. Notice to grandparents of subsequent hearings should be sent out by OCS, according to Ms. Raymond.

The investigator requested that Ms. Raymond conduct a poll of the Attorney General's offices statewide and inquire about problems or other issues AG's have experienced with telephone procedures and telephonic participation by parties, witnesses, or other persons. In response to this request, Ms. Raymond provided the following information in a letter on September 19, 2008:

With respect to telephone participation issues, in addition to speaking with AAGs across the state, I contacted Susanne Dipietro of the Court Improvement Project. She was kind enough to send me the excerpts of findings from a court improvement survey from February 2006. Telephone procedures and telephonic participation in Child in Need of Aid proceedings was one area of inquiry. Those findings are attached for reference. Many of the issues highlighted in the findings continue to be issues across the state to varying degrees although there does appear to be some improvement in the area of telephone technology.

Also attached is a copy of Civil Rule 99 regarding telephonic participation in civil cases and a copy of Administrative Rule 48 regarding telephonic hearing costs. Civil Rule 99 governs when telephonic participation should be allowed in civil cases and only references parties, counsel and witnesses. There is no provision for non-party participants such as grandparents and foster parents. The rule does not contain standardized procedures how one would obtain authorization from the court to appear telephonically. Rather, it is my understanding that each court district sets up its own procedures. This may cause some frustration in various geographic areas, either due to the lack of a clear procedure and/or the efficiency and effectiveness of a procedure.

Administrative Rule 48 should seemingly apply in CINA cases where people are participating telephonically. However, as with Civil Rule 99, it only references parties and does specifically speak to non-party participants. Again, it appears that each court district deals with the issue differently. In some areas, there appears to be significant confusion as to whether the court or a particular party is responsible for the cost of a call to a non-party participant.

Please be aware that some of this information is anecdotal in nature. Most people indicated that in their experience, people are generally able to participate meaningfully in hearings where they desired to do so.

## **Sharon Heidersdorf, First Judicial District Clerk of Court**

The investigator also contacted Sharon Heidersdorf, clerk of court for the first judicial district, for information concerning the in-court clerk's responsibilities when a person has asked to call in and participate telephonically. Ms. Heidersdorf responded as follows:

The in-court clerk does not check the phone lines prior to a hearing. Prior approval must be given before telephonic participation is allowed. Generally, there are two ways to participate telephonically 1) the party who is requesting telephonic participation must set up the teleconference line and inform the judicial assistant which number the in-court should call before the hearing starts or 2) if they call in direct to the judicial assistant, the assistant will transfer the call to the in-court clerk. The exception is children-in-need-of-aid or juvenile delinquency cases in which we have preset teleconference numbers which parties can access. However, it is up to the attorneys to let their clients know the telephone number and inform the court that the line will be used so that the in-court [clerk] can open the conference line before the hearing starts. We have experienced situations in the past where the wrong dedicated teleconference number was given to the person.

As a side note, the phone system in the courtroom will only allow one call received at a time. If a second party calls in to the judicial assistant and another call has already been forwarded into the court room there is no way of allowing the second party to participate short of walking in and requesting the first party to disconnect from the hearing. This is why it is imperative that all parties (whether pro se, attorneys and clients etc...) who want telephonic participation file a request in advance. If more than one party wants to participate we require them to arrange a teleconference hearing.

## **Brad Witt, Mail Services Manager, Central Mail Services**

The investigator also contacted Brad Witt, the Mail Services Manager for Central Mail Services, for information on the procedures followed by his staff when picking up outgoing mail for the Department of Law in Juneau. According to Mr. Witt, all outgoing mail for the Department of Law has a central pick-up location at the main office in Juneau. Department of Law staff place the outgoing mail on a table for pick-up by Central Mail, scheduled twice a day at approximately 9 a.m. and 2:30 p.m., Monday through Friday. Mail picked up by 2:30 p.m. is postmarked the day of receipt and prepared for delivery to the U.S. Post Office by 4 p.m. Mr. Witt said that any outgoing mail picked up from Law during these two pick-up times, is postmarked and mailed by Central Mail the same day of pick-up. However, he also stated that Law has their own postage meter and therefore has the capability to postmark their own mail. Central Mail postmarks any outgoing mail not previously postmarked by Law.

The investigator asked Mr. Witt to review the envelope provided by the complainant to determine if it was postmarked by a Department of Law postage meter or a Central Mail postage meter. According to Mr. Witt, the postage mark on the envelope was produced by a Central Mail postage meter, not Law. Mr. Witt had no definitive explanation for the 11-day delay in mailing the envelope to the Grandfather. However, he did note that the

fact the envelope was not postmarked by Central Mail until August 26, 2008, did not discount the possibility that Law staff did not place the envelope on Law's pick-up table until sometime after August 15, 2008. He stated that all mail picked up from Law is postmarked and mailed the same day it is picked up by his staff.

### **Activity Since the Investigation Was Opened**

On August 15, 2008, the Attorney General's office filed a motion with the presiding judge who had dismissed the underlying CINA proceeding on January 24, 2008. In the motion, the Attorney General requested that the CINA case be re-opened for the limited purpose of allowing the maternal grandfather to provide information to the court that he was prevented from providing during the January 24, 2008 hearing "due to the inadvertent failure to open the telephone lines."

As of the writing of the finding of record, Judge Pallenberg has not ruled on the Attorney General's August 15, 2008 motion and the CINA case remains closed. The proposed order remains in the file unsigned by Judge Pallenberg and the case remains closed. The AG filed nothing further and no other person has either.

On September 4, 2008, the Grandfather contacted the investigator to file an additional complaint against the Attorney General's office. The Grandfather alleged that someone at the Attorney General's office purposefully failed to mail him a copy of the August 15, 2008 motion for 11 days after it was filed with the court. The Grandfather told the investigator that he did not receive the materials until August 29, 2008 and the date stamp on his envelope indicated that it was not mailed until August 26, 2008. The Grandfather provided a copy of the envelope and its contents to the ombudsman. The investigator confirmed that the certificate of service signed by Law Office Assistant Sherese Holladay stated that a courtesy copy was mailed to the Grandfather on August 15, 2008 via U.S. mail, whereas the postage meter on the envelope indicated it was not mailed until August 26, 2008.

In response to this additional allegation, the investigator contacted Ms. Raymond and requested that she investigate why the Juneau Attorney General's office did not mail the Grandfather a copy of the motion on the filing date as stated on the certificate of service signed by an AG staff member.

On September 19, 2008, Ms. Raymond mailed a copy of the Attorney General's file for the underlying CINA case to the investigator for review. Included with the file was a letter by Ms. Raymond in which she provided further information concerning the delayed mailing to the Grandfather:

Our office is very cognizant that certificates of service need to be accurately dated and mailed. Upon hearing of the apparent mailing discrepancy, we undertook to examine and make inquiries of our Juneau office staff for an explanation on the disparity between the date on the certificate of service and the mail stamp on the envelope of the Grandfather's courtesy copy of the motion filed August 15, 2008. The documents were file stamped by the court on August 15, 2008 and we verified that the father, [Name redacted by Ombudsman], received his copy in the mail in a timely manner. All other parties have court boxes so

mailing wasn't necessary. At this time, the Department of Law doesn't have any reason to believe that the mistake originated out of our office. Rather, the discrepancy appears to be a result of an issue in Central Mail for which we have no explanation.

## **ANALYSIS AND FINDINGS**

AS 24.55.150 authorizes the ombudsman to investigate administrative acts that the ombudsman has reason to believe might be contrary to law; unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory, even though in accordance with law; based on a mistake of fact; based on improper or irrelevant grounds; unsupported by an adequate statement of reasons; performed in an inefficient or discourteous manner; or otherwise erroneous. "The ombudsman may investigate to find an appropriate remedy."

Under 21 AAC 20.210 the ombudsman evaluates evidence relating to a complaint against a state agency to determine whether criticism of the agency's actions is valid, and then makes a finding that the complaint is *justified*, *partially justified*, *not supported*, or *indeterminate*. A complaint is *justified* "if, on the basis of the evidence obtained during investigation, the ombudsman determines that the complainant's criticism of the administrative act is valid." Conversely, a complaint is *not supported* if the evidence shows that the administrative act was appropriate. If the ombudsman finds both that a complaint is *justified* and that the complainant's action or inaction materially affected the agency's action, the complaint may be found *partially justified*. A complaint is *indeterminate* if the evidence is insufficient "to determine conclusively" whether criticism of the administrative act is valid.

The standard used to evaluate all ombudsman complaints is the **preponderance of the evidence**. If the preponderance of the evidence indicates that the administrative act took place and the complainant's criticism of it is valid, the allegation is found justified.

***Allegation 1: Contrary to law: The Office of Children's Services failed to serve written notice of a CINA hearing on the grandparents of a child who was the subject of the proceeding.***

The Office of the Ombudsman's Policies and Procedures Manual at 4040(1) defines *contrary to law*. The portion of the definition relevant to this allegation is:

(A) Failure to comply with statutory or regulatory requirements.

### **Standards: Statutes, Regulation, Rules of Court, OCS Policies**

**AS 47.10.030(d)** states that OCS must provide grandparents with advance written notice of all court hearings concerning a grandchild in state custody pursuant to the Children in Need of Aid statutes:

. . . [T]he department shall give advance written notice of all court hearings in a child's case to a grandparent of the child if

- (1) the grandparent has contacted the department, provided evidence acceptable to the department of being the child's grandparent, requested notice about the hearings in the child's case, and provided the department with a current mailing address; or
- (2) the department is aware that the child has a grandparent and the grandparent's mailing address is on file with the department.

A simultaneous amendment to the general notice provision, **AS 47.10.030(b)** added qualifying grandparents to the list of individuals who “shall be given notice” regarding a child's proceedings. Ch. 43, § 1, 2, SLA 2001.

**AS 47.10.030(b)** states in part:

...each grandparent of the child shall be given notice adequate to give actual notice of the proceedings and the possibility of termination of parental rights and responsibilities. . . Notice shall be given in the manner appropriate under the rules of civil procedure for the service of process in a civil action under Alaska law or in any manner the court order directs. Proof of the giving of the notice shall be filed with the court before the petition is heard.

**AS 47.10.070 (a)** further provides that:

The department shall send notice of the hearing to the persons for whom notice is required under AS 47.10.030(b) **and to each grandparent of the child entitled to notice under AS 47.10.030(d)**. The department and the persons to whom the department must send notice of the hearing are entitled to be heard at the hearing. [Emphasis added]

**AS 47.10.070 (d)** further states that:

The grandparents of the child . . . may attend hearings that are otherwise closed to the public under (c) of this section.

**Alaska Rules of Court, Child in Need of Aid Rule 3(a)** states that “Notice of each hearing must be given to all parties and to any foster parent within a reasonable time before the hearing. . . Notice to a foster parent or out-of-home care provider must be provided by the Department.”<sup>3</sup>

OCS’s policy and procedures manual section **6.6.3 Notification of Court Hearings and Case Conferences** implements the statutory notice to grandparents as follows:

**POLICY:** Notification of court hearings and case conferences will be provided in a timely manner to the parties to the case (i.e. parents, guardian ad litem, and tribes or Indian custodians intervening in the case), tribes or Indian custodians not intervening in the case, foster parents, relative caregivers, and the child’s grandparents.

**PROCEDURE:**

- a. Court Hearings

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<sup>3</sup> The Notes to CINA Rule 3 state that under section 6 of Ch. 43, SLA 2001, CINA Rule 3 was amended by requiring that grandparents also be given notice of and an opportunity to be heard at CINA proceedings.

1. When an emergency or non-emergency petition is filed:
  - A. If the parents, guardian, or Indian custodian are available, the worker will review the petition with them and give them notice of the time and place for the hearing.
  - B. If the child is thought to be Alaska Native or American Indian, the worker will:
    - i. give informal notice of the hearing to the tribe by phone or fax, followed by a mailed notification; and
    - ii. notify the Assistant Attorney General of tribal affiliation in order that legal notice can be sent to the tribe for the initial hearing. The following information is required:
      - (a) Name of the child, child's birth date and birthplace.
      - (b) Name of Indian tribes in which the child is member of or may be eligible for membership.
      - (c) All names known, and current and former addresses of the Alaska Native or American Indian child's biological mother, biological father, maternal and paternal grandparents and great grandparents or Indian custodians, including birth, married and former names or aliases, birth dates, place of birth and death, tribal enrollment numbers and/or other identifying information.
      - (d) At the time of formal notice to the tribe, the worker or Attorney General will provide the tribe with the "Tribal Membership form."
2. The worker assigned to the case will inform the OCS designated administrative clerk about the parties in the case, and the date of court hearings.
3. The AG's office will:
  - A. provide notice of all court hearings and court case conferences to the parties to the case:
    - i. Parents;
    - ii. Guardian ad Litem;
    - iii. Tribes or Indian custodians intervening in the case.
  - B. provide notice of petitions for temporary custody, adjudication, permanency, and TPR hearings to the tribes or Indian custodians not intervening in the case.

4. **The OCS designated administrative clerk will provide written notice at least 10 days prior to the scheduled date of hearings, except for emergency hearings, to:**

A. Placements (Foster parents, relative caregivers, or other out-of-home care providers);

B. **Child’s grandparents.** (Emphasis added).

**Overview of Who is Responsible for Sending Notices**

Required Notices	Parties to the Case*						
	Parents	GALs/ CASAs	Tribes and/or Indian Custodians  Intervenin g in Case	Tribes and/or Indian Custodians  Not Intervening in Case	Placements	Grandparent s	Secondary Worker
Emergency Custody Hearings	OCS Worker		OCS Worker (informal notice)	OCS Worker (informal notice)			
Court Hearings/  Court Case Conferences	AG’s Office	AG’s Office	AG’s Office	AG’s Office (Petitions for temporary custody, adjudication, permanency, and TPR hearings.)	OCS designated Admin Clerk**	OCS designated Admin Clerk	OCS designated Admin Clerk
Case Reviews or OCS Case Conferences	OCS designated Admin Clerk	OCS designated Admin Clerk	OCS designated Admin Clerk	OCS designated Admin Clerk	OCS designated Admin Clerk	OCS designated Admin Clerk	OCS designated Admin Clerk

• \* Any party requesting a hearing is responsible for notifying all other parties.

• \*\* The OCS worker assigned to the case will let the OCS designated administrative clerk know all parties in a case, and the dates of court hearings. Reviewers will let the OCS designated administrative clerk know the dates of the Family and Children Early Conference (3-month) and Child and Family 6-month conferences. OCS designated administrative clerk will provide written notice at least 10 days prior to the scheduled date of the conference and hearing, except for emergency hearings.

**Ombudsman Analysis of Allegation 1**

On August 30, 2007, the Assistant Attorney General mailed written notice of the first scheduled pre-trial hearing and adjudication hearing calendared for November 20, 2007 and November 27, 2007 to the complainant despite OCS’s policy and procedures manual indicating that an OCS designated administrative clerk is responsible for sending notice

of hearings to grandparents. Neither OCS, nor the Attorney General, sent subsequent written notices of the rescheduled hearings to the Grandparents after the November 20, 2007 pre-trial hearing.

Ms. Raymond said that the Attorney General's office always sends out the first notice to grandparents and the responsibility for sending out other notices lies with OCS. According to Ms. Sonner, the assigned OCS caseworker is responsible for sending out written notice of the hearings to grandparents. This statement is supported by OCS's policy according to the investigator's review.

OCS did not notify the Grandfather in writing of the rescheduled pre-trial hearing and adjudication hearing, nor did OCS send written notice of any of the prior CINA hearings that were held in this case. The only notice of any of the CINA hearings sent to the Grandfather was the August 30, 2007 notice, which was prepared and mailed by the Attorney General's office.

OCS's failure to notify the Grandfather in writing of the January 24, 2008 pre-trial hearing is contrary to the requirements of AS 47.10.030(d), AS 47.10.070 (a), CINA Rule 3, and OCS P&P 6.6.3. As the Grandchild's grandfather, the Grandfather was entitled to written notice *before* the commencement of the January 24, 2008 court proceeding. The Grandfather had the right to notification in writing regardless of whether he had telephonically attended the earlier November 20, 2007 CINA hearing where the new pre-trial date was scheduled. OCS has a statutory obligation to provide written notice of all CINA hearings to a grandparent.

AS 47.10.030(d) was enacted in 2001 as part of HB 164 (Ch. 43, § 1, 2, SLA 2001). Representative Fred Dyson was the bill's primary sponsor. The intent of this legislation according to Rep. Dyson's sponsor statement was to ensure that grandparents have an opportunity to be heard at CINA hearings and custody hearings when the hearings involve their grandchildren. [See, HB 164 Sponsor Statement, updated March 30, 2001.]

During a House Judiciary Committee meeting held on April 20, 2001, Rep. Dyson testified that his intention in proposing the legislation was to give grandparents the right to be heard in CINA and custody hearings. He noted that HB 164 did not make grandparents "a party" in the technical sense, but it does give them a right to be heard in court so that their perspective regarding a child's placement can be taken into account.

Further, CINA Rule 3(c) states that "[a] grandparent of a child and the out-of-home care provider are entitled to be heard at any hearing at which the person was present."

Recognizing the importance of OCS's compliance with the mandatory requirements of grandparent notice, on March 7, 2008, the Alaska Supreme Court held that the Office of Children's Services committed error by failing to provide written notice to grandparents of any CINA proceeding involving their grandchildren. See, *Jacobs v. OCS*, 177 P.3d 1181 (Alaska 2008). In discussing whether OCS violated the grandparents' due process rights by failing to provide written notice of their grandchildren's CINA hearings, the court noted,

[N]otice of proceedings and a meaningful right to be heard are essential to due process. . . . Timely notice and opportunity to be heard are especially important in situations involving the placement of children.

Though the underlying facts of the complaint before the ombudsman and the Jacobs' case differ in several respects, the primary issue of concern in both cases is the failure of OCS staff to ensure compliance with the grandparent notice requirements of AS 47.10.070.

In the Jacobs case, the grandparents successfully intervened in the later CINA proceedings and sought a declaratory judgment from the Court that OCS violated their statutory rights:

- by failing to place their grandchildren in their care,
- by failing to notify them of all court hearings in the CINA cases, and
- by failing to give them notice and an opportunity to be heard in the permanency hearings.

In deciding this issue, the Alaska Supreme Court noted that it was troubled by OCS's history of refusing to provide the grandparents with notice of agency decisions or actions relating to their grandchildren and resistance to including the grandparents in their grandchildren's CINA proceedings. Accordingly, the court held that the Jacobs were entitled to a judicial declaration that they had a right to notice of any CINA proceedings involving their grandchildren, as well as a declaration that their right to notice was violated by OCS when they did not receive notice after the effective date of amendments to the statute in 2001. Based on the current complaint before the ombudsman, this issue continues to be a problem.

OCS's failure to comply with the grandparent notice requirements in the present complaint may be attributed to the conflict between the written provisions of OCS's policy manual concerning who is responsible for sending written notice to grandparents, versus how this requirement is actually implemented by OCS and the AG's office. While OCS's written policy states that an OCS-designated administrative clerk is responsible for sending written notice to grandparents, this does not appear to be the case in the Southeast OCS office. Instead, the Attorney General's office is responsible for preparing and mailing out the first written notice to the grandparents. From that point forward, any further written notices to grandparents become OCS's responsibility, according to the Attorney General's office. However, the law and policy as currently written directs that OCS is the agency responsible for complying with this statutory requirement. The AG's office is required to provide written notice of hearings only to case parties, according to current OCS policies.

OCS did not comply with the statutory requirements of AS 47.10.030(d) and AS 47.10.070(a) by providing the Grandfather with advance written notice of the January 24, 2008 hearing. Further, there is no evidence that OCS provided written notice of any of the prior hearings held on this matter. Therefore, the ombudsman finds the allegation that OCS acted contrary to law *justified*.

### **OCS Response to Allegation 1 Finding**

**OCS Response:** OCS did not dispute the findings of allegation 1.

**Law Response:** Law did not respond to the findings of Allegation 1 as they were directed at OCS.

Because OCS did not dispute the findings in Allegation 1, this allegation will be closed as justified.

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***Allegation 2: Unfair: The Office of Children’s Services failed to notify the court of a grandparent’s request to participate telephonically at a CINA proceeding.***

**Standards applicable to Allegation 2:**

The Office of the Ombudsman’s Policies and Procedures Manual at 4040(3) discusses and defines *unfair as:*

An administrative act violated some principle of justice.

Investigation of a complaint that an administrative act was “unfair” should consider both the process by which the action was taken or the decision was made and the equitableness of that decision, that is, the balance between the agency and a complainant in the decision-making process.

Procedurally, a complaint that an administrative act was “unfair” usually will involve an examination of one or more of the following elements:

- (A) adequate and reasonable notice of the matter was not provided to the complainant;
- (B) adequate opportunity was not given for a person having an interest in a decision to be heard or, if applicable, to conduct an examination or cross-examination to secure full disclosure of the facts;
- (C) the decision maker was not without bias or other disqualification;
- (D) the decision was not made on the record: the action or decision was made without consideration of pertinent facts and circumstances, or the testimony, evidence, or point of view of those having a legitimate interest in the decision was disregarded;
- (E) the decision was not supported by reasons or by a statement of evidence relied on; or
- (F) the agency applied standards or principles inconsistently in making a decision.

**Alaska Rules of Court, Child in Need of Aid (CINA) Rule 3(a)** states that “Notice of each hearing must be given to all parties and to any foster parent within a reasonable time before the hearing. . . Notice to a foster parent or out-of-home care provider must be provided by the Department.”<sup>3</sup>

The notes to CINA Rule 3 indicate that Ch. 43, SLA 2001, amended AS 47.10.030, AS 47.10.070(a), and AS 47.10.080(f) to add provisions concerning notice to and participation by grandparents. According to §6 of the Act, these provisions have the

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<sup>3</sup> Article IV, Section 15, of the Alaska Constitution states, “The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.”

effect of amending CINA Rules 3, 7, 10, 15, 17, and 19 by requiring that grandparents be given notice of and an opportunity to be heard at certain child-in-need-of-aid proceedings.

Party is defined by **CINA Rule 2(l)**:

‘Party’ means the child, the parents, the guardian, the guardian ad litem, the Department, an Indian custodian who has intervened, an Indian child’s tribe which was intervened, and any other person who has been allowed to intervene by the court.

Grandparents are not included in the definition of a party in its technical sense, unless the court has granted that status through intervention.

**CINA Rule 3(c) Presence of Grandparent or Out-of-Home Care Provider** states:

A grandparent of a child and the out-of-home care provider are entitled to be heard at any hearing at which the person is present. However, the court may limit the presence of these persons in a hearing that has been closed to the public under (f)(2) of this rule to the time during which the person’s testimony is being given if the court determines that such a limitation is necessary under the circumstances listed in (f)(2)(C) of this rule.

**CINA Rule 3(g) Telephonic Participation** states:

- (1) The court may conduct any hearing with telephonic participation by one or more parties, counsel, witnesses, foster parents or out-of-home care providers, or the judge.
- (2) . . .
- (3) Procedures for telephonic hearings are governed by Civil Rule 99(b) . . .

**Civil Rule 99(b) Telephonic Participation in Civil Cases** states:

(a) **Authorization for Telephonic Participation.** The court may allow one or more parties, counsel, witnesses or the judge to participate telephonically in any hearing or deposition for good cause and in the absence of substantial prejudice to opposing parties. Authorization for a witness to telephonically participate in a deposition does not bar the witnesses’ testimony from being videotaped under Civil Rule 30.1; nor does it bar a party or attorney from being present at the site at which the witness is physically present.

(b) **Procedure.** The following procedure must be observed concerning telephonic participation in court hearings:

- (1) Hearings involving telephonic participation must be scheduled in the same manner as other hearings.
- (2) When telephonic participation is requested, the court, before the hearing, shall designate the party responsible for arranging the call and the party or parties responsible for payment of the call pursuant to Administrative Rule 48.

**Administrative Rule 48. Telephonic Participation in Civil Cases** states:

The party inconvenienced by holding a hearing telephonically shall pay the telephone cost of the hearing. The court shall pay the telephone cost if the judge is able to avoid traveling to the hearing. The defendant shall pay the cost if the civil defendant, criminal defendant who is not in custody, defense attorney or defense witness is able to avoid traveling to the hearing. The plaintiff or prosecution shall pay the cost if the plaintiff, prosecutor, witness for the plaintiff or prosecution, or criminal defendant who is in custody is able to avoid traveling to the hearing. When a hearing is set telephonically at the request of or for the convenience of more than one party, the court may order one of those parties to pay the cost and order the other inconvenienced parties to compensate that party for a portion of the cost.

## **Ombudsman Analysis of Allegation 2**

The court rules cited above fail to address directly situations where a grandparent is phoning in to participate. According to Ms. Heidersdorf, clerk of court for the Juneau Trial courts, prior approval generally must be given by the court before telephonic participation is allowed. There are two ways to participate by telephone according to Ms. Heidersdorf: (1) the party requesting telephonic participation must set up the teleconference line and inform the judicial assistant which number the in-court clerk should call before the hearing starts; or (2) the phone participant calls in directly to the judicial assistant, who will transfer the call to the in-court clerk.

However, Ms. Heidersdorf noted that there was an exception to this general rule for children-in-need-of-aid or juvenile delinquency cases in which there is a pre-set teleconference number that parties can call. According to Ms. Heidersdorf, it is up to the attorneys to let their clients know the telephone number and to inform the court that the line will be used so that the in-court clerk can open the conference line before the hearing starts. She acknowledged that there have been situations in the past where the wrong dedicated teleconference number was given out and, as a result, people were unable to participate at a court hearing.

According to Ms. Fleming's April 23, 2008 e-mail to OCS Regional Supervisor Ritchie Sonner, the Grandfather spoke with OCS Supervisor Sharon Fleming on January 22, 2008, and told her that he planned to call in to the January 24 hearing. Conversely, the Grandfather states that he told Ms. Fleming during this conversation that he would be calling in to testify, not just to listen. According to the Grandfather, Ms. Fleming provided him with the teleconference number to call. According to Ms. Fleming, he already had the number to call and sounded like he was reading from a notice of the hearing. However, as previously discussed, neither OCS nor the Attorney General provided written notice of the January 24 hearing to the Grandfather. Thus, if the Grandfather was reading from a notice of a hearing, it must have been the only written notice provided to him by the Attorney General: the August 30, 2007 Notice to Grandparents of Court Hearings.

During her review of OCS's files, the investigator determined that the Grandfather also had contacted the Attorney General's office on January 22, 2008 and spoke to paralegal Vickie Houtary. Ms. Houtary in turn e-mailed Assistant AG Hanna Sebold, supervising Assistant AG Jan Rutherfordale, OCS caseworker Sharon Fleming, and OCS caseworker

Julia Harbers, notifying them of his contact. A series of e-mail communications between these staff members continued. All persons who were part of this e-mail exchange were aware that the Grandfather intended to call in to the January 24 hearing. However, despite this, neither Ms. Harbers nor Ms. Sebold, who were included in the e-mails and attended the hearing that day, notified the court that the Grandfather would be calling in.

Both Ms. Fleming and Ms. Harbers had knowledge prior to the January 24, 2008 hearing that the Grandfather had contacted OCS and the AG's office to express his desire to testify by telephone at the hearing. While the evidence is in dispute whether the Grandfather informed either agency that he wanted to *testify* as opposed to simply *participate* telephonically, as a grandparent, the Grandfather had a right to voice his concerns at this hearing. His opportunity to be heard, afforded to him by AS 47.10.070(a), was not provided due to OCS's failure to notify either the in-court clerk or the presiding judge about the Grandfather's contact with their agency two days before the hearing.

In OCS's *A Guide to Child Protective Services for Relatives*, OCS states that it recognizes the importance of the family unit, the extended family, and culture as resources for the well-being of children. Grandparents are advised in this booklet that they are entitled to be heard at court hearings and that the grandchild's caseworker is responsible to provide the grandparent with advanced written notice of all hearings. However, despite recognizing the importance of grandparent's participation in child protection proceedings, the Grandfather, a grandparent, was not notified in writing of the pre-trial hearing (or any other hearing held in the CINA proceeding) by OCS as required by law. Additionally, OCS failed to make any effort to alert the court that the Grandfather wanted to participate at this hearing.

While the Grandfather's comments or testimony to the court may not have changed the outcome of this hearing, he had a right to voice his concerns to the presiding judge. As a grandparent, the Grandfather was not considered a party to the CINA proceeding as defined by the court rules and did not have an attorney advocating for his right to be heard. For whatever reason, OCS staff did not inform the court at the beginning of this hearing that the Grandfather had contacted them and that he would phone in. That was unfair. With this information, the in-court clerk would have known to keep the phone lines open and the Grandfather would have been able to participate.

Therefore, the ombudsman finds this allegation *justified*. The ombudsman recognizes that the error here did not rest with OCS alone, but was shared with the Attorney General who also knew of the Grandfather's intent to participate as discussed under Allegation 4 which follows.

## **OCS Response to Allegation 2 Finding**

**OCS Response:** OCS did not dispute the findings of Allegation 2.

**Law Response:** Law did not respond to the findings of Allegation 2 as they were directed at OCS.

Because OCS did not dispute the findings in Allegation 2, the ombudsman will close this allegation as *justified*.

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*J2008-0229 Allegation 3: Contrary to law: The Department of Law failed to serve written notice of a court proceeding to the grandparent of the child who was subject of the proceeding.*

### **Ombudsman Analysis of Allegation 3 and Agency Response**

As previously discussed under Allegation 1, the statutory obligation (AS 47.10.030 (d)) to serve written notice of a court proceeding on a grandparent rests with OCS, despite the practice of the Attorney General's office to send out the first notice to grandparents. Therefore, the ombudsman finds this allegation not supported.

**OCS Response:** OCS did not dispute the findings of Allegation 3.

**Law Response:** Law agreed with the preliminary findings of Allegation 3 and did not further address the findings in its response.

Because Law did not dispute the preliminary finding in Allegation 3, the ombudsman has closed this allegation as not supported.

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*J2008-0229 Allegation 4: Unfair: The Department of Law failed to notify the court of a grandparent's request to participate telephonically at a CINA proceeding.*

The standard for *unfair* as defined by the Ombudsman's Policies and Procedures Manual at 4040(3) is cited under Allegation 2.

### **Ombudsman Analysis of Allegation 4**

As of January 22, 2008, the Department of Law was aware that the Grandfather had informed Law and OCS that he would be calling into the January 24, 2008 hearing. However, AAG Sebold failed to notify the presiding judge at the start of this hearing of the Grandfather's contact and did not request the in-court clerk keep the teleconference line open to enable the Grandfather to call in.

Ms. Sebold's January 30, 2008 e-mail to Ms. Sonner stated that her attention focused on the parties and not the Grandfather, a non-party. She said she does not remember whether she asked to have the court phone lines open. She said that the in-court clerk is supposed to open the lines, so she just assumed that they were open. Ms. Sebold implies that she had no responsibility to ensure that the Grandfather was able to participate in this hearing, as he was a non-party to the proceeding and his interests were subordinate to the interests of the parties. However, it was unfair of Ms. Sebold not to have simply notified the court and the in-court clerk at any time during the hearing that the Grandfather had contacted her office and indicated he intended to call into the hearing. As a grandparent of the minor child involved in a CINA proceeding, the Grandfather had the right to be heard at this hearing as conferred by AS 47.10.070(a). The Department of Law disregarded the Grandfather's right to be heard when Ms. Sebold failed to alert the court that the Grandfather intended to phone in.

In her e-mail to Ms. Sonner, Ms. Sebold implies that the court bears the responsibility to keep the phone lines open, as opposed to the Attorney General requesting the line be kept open. However, Ms. Heidersdorf, clerk of court for the First Judicial District, noted that with child-in-need-of-aid proceedings or a juvenile delinquency case there is a pre-set teleconference number that persons can access to participate telephonically during a court hearing. According to Ms. Heidersdorf, it is the attorneys' responsibility to inform the court that persons intend to participate telephonically so that the in-court clerk can open the conference line before the hearing starts. Likewise, in Judge Pallenberg's January 28, 2008, letter to the Grandparents, he wrote that "[b]ecause no one advised the court there was anyone wishing to participate in the hearing today by telephone, the clerk did not call the conference line."

The Grandfather presumed that because he had contacted both the Attorney General and OCS two days prior to the hearing and stated that he would be calling into this hearing, that one or both of the agencies would notify the court of his request. This was a reasonable expectation.

Several months after the Grandfather filed his complaint with the ombudsman, Law recognized that the Grandfather had been denied his right to be heard. Law filed a motion with the court requesting that the presiding judge reopen either the closed CINA proceedings or the civil custody case for the limited purpose of giving the Grandfather an opportunity to testify. To date, the court has not ruled on this motion and neither the Attorney General nor the complainant has pressed to schedule one.

The ombudsman standard of fairness involves giving interested persons an opportunity to be heard. The Attorney General failed this standard by not alerting the court that an interested person intended to phone in to the hearing. Because no one, including the assistant attorney general, advised the court that the Grandfather would be calling into the hearing, the in-court clerk did not check the conference line, and the Grandfather was never able to get through. As a result, he was unable to be heard at this hearing. Therefore, the ombudsman finds this allegation justified.

OCS did not respond to the finding in this allegation as the allegation was directed at Law.

## **Law Response to Allegation 4 Finding**

**Law Response:** Law disagreed with the finding and requested that it be modified.

Ms. Raymond responded in part to the finding as follows:

Allegation 4 is that the Department of Law failed to notify the court of a grandparent's request to participate telephonically at a CINA proceeding. The finding of "justified" implies that the Department had such a duty. We disagree with this implication.

While the Department of Law agrees that fairness involves giving non-party grandparents and foster parents an opportunity to be heard, the Department submits rather than finding a duty where it does not exist, the report should acknowledge that non-party telephonic participation in Child in Need of Aid cases is a systemic issue that needs to be addressed. There is no requirement in AS

47.10.030(d) that the written notice to grandparents include a mechanism on how to participate telephonically. To the extent that phone numbers and instructions are provided, they are given with the intent of encouraging participation by those entitled to receive notice. The report acknowledges that there are relaxed procedures for CINA cases for parties to participate telephonically and that the requirements of Rule 99 are not strictly followed. Ms. Heidersdorf, clerk of court for the Juneau trial court, was correct in noting that it is up to the attorneys to let the court know that their “clients” are calling in to participate. [The Grandfather] was not a client of the Department of Law. It was not the Department of Law’s responsibility to ensure that the court opened its phone lines for the Grandfather. Unfortunately, under the current procedures in the Juneau court, it is not clear whose responsibility it is to alert the court that a non-party would like to participate telephonically.

Ms. Raymond also disagreed with the preliminary report’s discussion under allegation 4 concerning Law’s pending motion requesting that the presiding judge reopen either the closed CINA proceedings or the civil custody case. Specifically, Ms. Raymond objected to “the assertion that the Attorney General’s Office failed to follow up on the motion the Department filed to have the court re-open either the CINA hearing, or the civil custody case. . . . An assistant attorney general called the court to inquire as to the status of that motion on several occasions between the time the motion was filed on August 15, 2008, and June 2009. This information was communicated to Ms. Christensen.

#### **Ombudsman Response to Law’s Comment on Allegation 4**

The ombudsman declines to modify the justified finding as requested by Law. While the ombudsman agrees that there currently is no statutory, administrative or court rule mandating Law alert the court that a non-party has requested telephonic participation during a CINA hearing, Law’s argument on this point misses the mark, as the ombudsman’s justified finding of unfairness was not based on a violation of a statute or court rule but on the Ombudsman standard for *unfair* as defined by the Ombudsman’s Policies and Procedures Manual at 4040(3). Under this standard, the ombudsman is not required to find Law breached any legal duty in order for the allegation to be justified. Under this Ombudsman standard, an administrative action can be found unfair by the ombudsman where the evidence indicates “an adequate opportunity was not given for a person having an interest in a decision to be heard or, if applicable, to conduct an examination or cross-examination to secure full disclosure of the facts.” An administrative act can be determined unfair where the action violates some principal of justice.

The ombudsman agrees with Law that similar problems could be greatly reduced in the future by guidelines outlining clearer procedures for the telephonic participation of non-parties in CINA proceedings, as well as possible revisions to the Alaska Rules of Court. Both Law and OCS are active participants with the Court Improvement Project, as well as the Alaska Child and Family Services Review Program Improvement Plan. Given their active participation with these two projects, both agencies have ample opportunity to further discuss this systemic issue with the other members in an effort to find a solution to correct the problem. Accordingly, the ombudsman proposes a fifth recommendation to

both Law and OCS to discuss the necessity of revisions to the Alaska Rules of Court or Alaska statutes to address another potential systemic problem, the lack of clear procedures for the telephonic participation of non-parties in CINA proceedings as further discussed below.

The ombudsman disagrees with Ms. Raymond that the justified finding unfairly placed the responsibility on Law to alert the court that the Grandfather could be on the phone waiting to participate. The responsibility rested on both OCS's and Law's shoulders, and quite possibly with the court as suggested by Law's response. However, the fact that the court also had the option to ask during this hearing if anyone was on the line does not diminish Law's ability to have remedied the problem as well. The ombudsman also recognizes that OCS's failure to inform the court about the Grandfather's contact with their agency was also unfair, thus the justified finding under allegation 3.

Law's response contends that because the Grandfather was not a client of Law, Law had no attorney-client relationship with the Grandfather, and therefore no legal obligation to let the court know he had contacted Ms. Sebold's office indicating he would be calling in to the January 24, 2008 hearing. The ombudsman notes that although Law also had no attorney-client relationship either with the Grandchild's father, AAG Rutherford felt obligated to remind Ms. Sebold on November 17, 2007 in an email (with bold text) to remember to keep the phone lines open so the Father, also a non-client, was able to call into the pre-trial hearing and participate telephonically. The ombudsman finds it difficult to understand the distinction. Why it was appropriate for Law to alert the court for the Father, but not for the Grandfather, when the agency had no attorney-client relationship with either gentleman. The only distinction that can be explained is that the Father was the child's biological father, and the Grandfather, a grandparent.

The ombudsman recognizes that it is not uncommon practice for parties and their attorneys to file subsequent motions with the court requesting a ruling on an outstanding motion, if in fact, a motion has been pending for an extended period of time. This did not occur. Based on the investigator's review of the court file, neither Law, nor the Grandfather, filed any further motions or other pleadings with the court requesting a ruling on this issue or requesting a hearing be scheduled. The investigator requested a status update on the outstanding motion from Ms. Raymond on several occasions (9/5/08, 9/19/08, 10/23/08 and 12/12/08), and Ms. Raymond timely responded to the investigator's requests indicating that the court had not made a ruling on the motion. However, this was the last information conveyed to the investigator concerning Law's efforts.

While Law objected to the Ombudsman's proposed finding in Allegation 4, the ombudsman did not accept Law's argument. This allegation will be closed as *justified*.

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***J2008-0229 Allegation 5: Contrary to law: The Department of Law failed to timely serve a grandparent with a copy of a court motion requesting that the court re-open a closed CINA proceeding.***

### **Standards Applicable to Allegation 5**

The Office of the Ombudsman's Policies and Procedures Manual at 4040(1), defines an administrative act as contrary to law if it involved:

- (A) failure to comply with statutory or regulatory requirements;
- (B) misinterpretation or misapplication of a statute, regulation or comparable requirement;
- (C) failure to follow common law doctrines;
- (D) failure to comply with valid court or administrative orders;
- (E) individual misconduct in which a state employee:
  - (a) performed for an illegal or improper purpose, or
  - (b) performed in an illegal manner (see AS 11.56.850, AS 11.56.860, or the Executive or Legislative Ethics Acts).

In determining whether the alleged conduct described by the complainant was contrary to law, the investigator reviewed Alaska Civil Rule 5, which states in relevant part:

**Rule 5. Service and Filing of Pleadings and Other Papers.<sup>1</sup>**

**(a) Service - When Required.** Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, **every written motion other than one which may be heard ex parte**, and every written notice, appearance, demand, offer of judgment, and similar paper **shall be served upon each of the parties** but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4. . . .

**(b) Service - How Made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party, by mailing it to the attorney's or party's last known address, by transmitting it to the attorney's or party's facsimile machine telephone number as provided in Civil Rule 5.1(b), or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the attorney's or party's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

**Mailing of a copy means mailing it by first class United States mail. Service**

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<sup>1</sup> Alaska Rules of Civil Procedure Part II. Commencement of Action -- Service of Process, Pleadings, Motions and Orders

**by mail is complete upon mailing.** Service by a commercial delivery company constitutes service by delivery and is complete upon delivery. . .

**(f) Proof of Service.** Proof of service of all papers required or permitted to be served, other than those for which a particular method of proof is prescribed in these rules, must state the name of each person who has been served, must show the day and manner of service and may be by written acknowledgment of service, by certificate of an attorney, an authorized agent of the attorney, or a pro se litigant, by affidavit of the person who served the papers, or by any other proof satisfactory to the court. **Proof of service must be made promptly and in any event before action is to be taken on the paper served by the court or the parties. Failure to make the proof of service required by this subdivision does not affect the validity of service; and the court may at any time allow the proof of service to be amended or supplied unless it clearly appears that to do so would result in material prejudice to the substantial rights of any party.** (Emphasis added).

Under the Alaska Civil Rules, the court may impose penalties against an attorney or a party for violating the rules of civil procedure.

**Civil Rule 95. Penalties**<sup>2</sup> provides that:

(a) For any infraction of these rules, the court, after providing reasonable notice and an opportunity to be heard, may withhold or assess costs or attorney's fees as the circumstances of the case and discouragement of like conduct in the future may require; and such costs and attorney's fees may be imposed upon offending attorneys or parties.

## **Ombudsman Analysis of Allegation 5**

On September 5, 2008, the Grandfather contacted the investigator and requested that the ombudsman investigate the failure of the Attorney General's Office to timely serve him with a copy of the court motion that was filed on August 15, 2008. According to the Grandfather, the certificate of service on this motion stated that it had been mailed to him on the same date that it was filed. However, the Grandfather said he did not receive the motion until August 29, 2008 and the postmark on the envelope was dated August 26. The Grandfather alleged that someone at the Attorney General's office purposely delayed the mailing of these documents in an effort to cover up what they had done wrong on his grandchild's case. He contended that this was criminal conduct.

The Complainant provided a copy of the postmarked envelope and its contents, which confirmed that the postmark on the envelope addressed to the Grandfather from Law was dated August 26, 2008. The certificate of service signed by a Department of Law legal assistant certified that a courtesy copy of this motion was mailed to the Grandfather on August 15, 2008.

The ombudsman asked AAG Carla Raymond to look further into the matter. On September 19, 2008, Ms. Raymond responded that she does not have any reason to

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<sup>2</sup> Alaska Rules of Civil Procedure Part XIII. General Provisions

believe that the mistake originated in their office. “Rather, the discrepancy appears to be a result of an issue with Central Mail for which we have no explanation.”

Brad Witt, the Mail Services Manager for Central Mail Services, detailed the postmarking and mailing process. He also reviewed the envelope provided by the complainant and said the postage mark on the envelope was produced by a Central Mail postage meter, not a postage meter at Law. Mr. Witt had no definitive explanation for the 11-day delay in mailing the envelope to the Grandfather. However, he did note that the fact the envelope was not postmarked by Central Mail until August 26, 2008, did not discount the possibility that Law staff did not place the envelope on Law’s pick-up table until sometime after August 15, 2008. He stated that all mail picked up from Law is postmarked and mailed the same day it is picked up by his staff.

The Grandfather was not a party to the CINA proceedings. He did not request intervention during the course of this action, which if granted, would have conferred upon him party status. Civil Rule 5 indicates that proof of service of all papers required or permitted to be served on a party must be made promptly. However, this rule does not address service on non-parties. Although the Department of Law was not required to serve the Grandfather with a copy of this motion under Civil Rule 5 because he was not a party, they mailed him a courtesy copy. The remedy requested by Law in this motion directly involved the Grandfather’s rights, the opportunity to be heard by the court during his grandchild’s CINA proceedings. Accordingly, it was appropriate for the agency to mail him a courtesy copy of this motion.

It is undisputed that there was an 11-day delay in mailing this motion to the Grandfather. According to Ms. Raymond, the discrepancy appears to be a result of an issue with Central Mail and she was unable to provide further explanation for the delay. According to Mr. Witt, Central Mail Services Manager, the postmark on the envelope was generated in the Central Mail office, not at the Department of Law. However, as noted by Mr. Witt, the fact that the postmark on the envelope was created on August 26, 2008 in the Central Mail office, does not negate the possibility that a Law staff member failed to put the envelope on the out-going mail table until August 26, 2008, 11 days after the date the certificate of service was signed by Law.

Other than the complainant’s speculation that someone at Law purposefully delayed mailing this motion to the Grandfather, the investigator found no evidence that the agency deliberately engaged in misconduct, or deliberately violated the Alaska Rules of Court by failing to ensure timely service of this motion on him. The ombudsman investigator was unable to conclusively determine the cause for the 11-day delay. There are potentially other unknown reasons for the delay. By way of example only, the envelope could have been misplaced by Central Mail for several days following the pick-up from Law on August 15, 2008 and once discovered, postmarked and mailed by Central Mail to the Grandfather on August 26, 2008. It is unclear what exactly transpired.

Therefore, the ombudsman finds the allegation *indeterminate*.

### **Law’s Response to Allegation 5 Finding.**

**Law Response:** Law agreed with the finding and responded as follows to the allegation:

The Department of Law is aware of the serious nature of affidavits and the need for them to be correct. We regret that we, and others, are unable to determine where mistakes were made that may have delayed the receipt of materials by [the Grandfather].

Because Law did not oppose the ombudsman's finding in this allegation, the finding will stand as *indeterminate*.

**OCS did not respond to this allegation as it was addressed to Law.**

\* \* \*

*J2008-0229 Allegation 6: Contrary to law: An Assistant Attorney General committed perjury during a CINA hearing when she testified that paternity of the minor child's biological father had not yet been determined.*

**Standards applicable to Allegation 6**

Perjury is defined by Alaska Criminal Law AS 11.56.200 as follows:

**AS 11.56.200. Perjury.**

(a) A person commits the crime of perjury if the person makes a false sworn statement which the person does not believe to be true.

Another similarly related crime is the crime of Perjury by inconsistent statements under **AS 11.56.230:**

(a) A person commits the crime of perjury by inconsistent statements if

(1) in the course of one or more official proceedings the person makes two or more sworn statements which are irreconcilably inconsistent to the degree that one of them is necessarily false;

(2) the person does not believe one of the statements to be true at the time the statement is made; and

(3) each statement is made within the jurisdiction of this state and within the period of the statute of limitations for the crime charged. . .

**Alaska Rules of Court, Rules of Professional Conduct 4.1 Truthfulness in Statements to Others** also provides additional guidance:

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6. (SCO 1123 eff. 7/15/1993; and rescinded and repromulgated by SCO 1680 eff. 4/15/2009).

**Ombudsman Analysis of Allegation 6**

The Grandfather alleged to the ombudsman investigator that during a November 25, 2007 court hearing, he asked if paternity of his grandchild had been determined. He said the

Assistant Attorney General told him on the record that paternity had not been established. He was unable to identify the AAG, but believes that this individual committed perjury, because according to his records, an Alaska man was determined to be the biological father of the Grandchild on October 4, 2007.

The investigator reviewed the court file and listened to the audio recordings from the three hearings that were held during this CINA case: August 27, 2007, November 20, 2007 and January 24, 2008. No hearing was held on November 25, 2007, according to the investigator's review.

The first hearing on the state's emergency custody petition was August 27, 2007. According to the audio recording from this hearing, paternity had not been established conclusively. The biological mother identified an Alaska resident as the biological father during her testimony. OCS Intake Supervisor Caroline Bruschi testified that the Mother had identified the Father as the child's father, but that he denied paternity. The Grandfather was connected 43 minutes after it had commenced. He identified himself as the maternal grandfather and stated that his wife was listening also. After further testimony by the Mother, and closing arguments by AAG Rutherford, GAL Reep, and Mr. Meachum, attorney for the mother, AAG Rutherford moved for a probable cause determination that the Grandchild was a Child in Need of Aid on an emergency basis. The court asked the Grandfather if he had any questions and he responded, "I have no questions." The court then concluded that the Grandchild was a Child in Need of Aid and the parties discussed scheduling future hearings. Just prior to the conclusion of the hearing, AAG Rutherford testified that she would approach the Father about paternity first, and then contact another man who asserted that he may be the child's biological father according to the state's petition for emergency custody.

The second hearing was held on November 20, 2007. At the start of this hearing, AAG Sebold requested a continuance for two months or more on behalf of AAG Rutherford because paternity had just been established on October 4, 2007 and she did not know whether the Father had an opportunity to engage counsel. The Father participated telephonically during the hearing and waived his right to counsel. The Grandfather joined the hearing via teleconference approximately three minutes into the hearing during a discussion between Ms. Sebold and Judge Pallenberg regarding calendaring issues and rescheduling the pre-trial and adjudication hearings. The Complainant apologized to the court for calling in late and indicated that he had been on the phone with a client.

Judge Pallenberg asked the Grandfather during this hearing whether he had any questions. The Grandfather questioned the court about the reason for the delay of the adjudication hearing and Judge Pallenberg deferred to Ms. Sebold for further explanation. Ms. Sebold stated that the information that had been provided to her was that paternity was just established and that it was necessary to make further efforts with the father before adjudicating. The Grandfather responded, "Got you." Judge Pallenberg then asked Ms. Reep, the GAL, if she had a conflict with the new date and if there was anything she wanted to add. Instead the Grandfather responded, "Just wanted to find out why the delay and you've informed me perfectly. Thank you." The GAL then responded to the question posed. After hearing no objections by any of the parties to the proceeding, Judge Pallenberg vacated the November 27, 2007 adjudication and rescheduled it to January 31, 2008, with the pre-trial hearing on January 24, 2008.

The Grandfather was unable to participate in the January 24 hearing; therefore he did not provide any testimony during this hearing.

The investigator also reviewed the AG's files. On August 29, 2007, the Father submitted a blood sample to paralegal Vicki Houtary of the AG's office for paternity testing. The laboratory testing the sample confirmed receipt on August 29, 2007. Blood samples for the Mother and the Grandchild were collected by OCS employee Karen Wood on September 17, 2007, and received by the laboratory on September 27, 2007. According to the agency's files, the laboratory established paternity on October 4, 2007. The Father was determined to be the biological father with 99.9 percent certainty. It is not clear from reviewing the AG's files when they received the results, as there is no date-received stamp on the lab report or any other record provided documenting the receipt date. However, a review of OCS's files indicates that Law faxed the paternity results to OCS on October 12, 2007. Likewise, Ms. Harbers faxed the paternity test results to AAG Rutherford on October 10, 2007 according to a fax coversheet contained within OCS's files. On the client authorization form that was completed by Ms. Houtary when originally submitting the samples for testing, she requested that additional result copies were to be sent directly to Ms. Harbers. More likely than not, the AG received the test results on or before October 10, 2007. The ombudsman concluded after reviewing the evidence, the relevant legal standards, and rules of conduct, that the evidence did not support a finding that Ms. Sebold committed perjury at the November 20, 2007 hearing. Review of the audio recording from this hearing shows that Ms. Sebold advised the court at the start of the hearing that paternity had been established on October 4, 2007. The Grandfather did not call into the hearing until several minutes had elapsed and he likely missed Ms. Sebold's initial testimony about the paternity test results. During the later discussion between the Grandfather and Ms. Sebold where he questioned the reason for the delay, she stated that paternity was "just" established and that the state needed to make more efforts with the biological father before adjudicating. The Grandfather interpreted this statement by Ms. Sebold to be false because he missed her initial testimony but this was not a false statement.

The recording makes it clear that Ms. Sebold did not perjure herself during the hearing by making this statement to the Grandfather. Therefore, the ombudsman finds this allegation unsupported.

### **Law's Response to Allegation 6 Finding**

**OCS Response:** OCS did not dispute the findings of allegation 6.

**Law Response:** Law agreed with the finding that the allegation was not supported by the evidence and therefore did not further address this allegation in their written response to the preliminary report.

Law did not dispute the ombudsman's proposed finding therefore this allegation will be closed as unsupported.

\* \* \*

***Allegation 7: Unreasonable: OCS failed to contemporaneously document telephone contacts with a grandparent as required by OCS P&P 6.8.1 and 6.8.2.***

According to the Office of the Ombudsman's Policies and Procedures Manual at 4040(2) an administrative act is unreasonable if:

- (A) the agency adopted and followed a procedure in managing a program that was inconsistent with, or failed to achieve, the purposes of the program,
- (B) the agency adopted and followed a procedure that defeated the complainant's valid application for a right or program benefit, or
- (C) the agency's act was inconsistent with agency policy and thereby placed the complainant at a disadvantage relative to all others.

**Ombudsman Analysis of Allegation 7**

During the investigation, the ombudsman added the above allegation against OCS based on a review of the agency's files. The basis for this was an admission by Sharon Fleming in her April 23, 2008 e-mail communication with Ritchie Sonner that she failed to document contacts with the Grandfather in ORCA as required by OCS P&P 6.8.1 and 6.8.2. The text of the e-mail communications follows.

In response to the investigator's April 23, 2008 request for copies of materials from the OCS file, Ms. Sonner sent the following e-mail to Sharon Fleming:

. . . Do you have any e-mails or other correspondence between you and [the Grandfather]? If there were phone conversations, and they're not documented in ORCA, I need some sort of documents summarizing the conversations. And if you have any other e-mails or correspondence about [the Grandfather's] request to testify at the court hearing, or anything else described below, please gather that all together too.

Ms. Fleming responded:

I have had two conversation [sic] with [the Grandfather]. The first one was on 11/27, right after my return. I was unfamiliar with this case and basically just listened to him and advised that I would check about his concerns.

. . .

My next conversation with him was on 1/22/08, after we have reunified. No one had told him that we had reunified and so I told him that. I advised him of the court hearing (1/24) and asked if he had the phone number to call into. He had it and it sounded like he was reading from a notice of the hearing, but it could be that he got the phone number from a different source. He told me that he planned on calling in to the hearing.

I just spoke with Julia and she said that all of her contacts with [the Grandfather] are in ORCA. **I refrained from putting mine in ORCA because they were so contentious and I was just letting him vent. I**

tried, unsuccessfully, on our second conversation to explain that father's (sic) have rights and he cited for me CO and CA laws and just became angrier. (Emphasis added).

## Standards applicable to Allegation 7

**OCS P&P 6.8.1 d Case Records**, requires that Reports of Contact must be current in each case record:

d. Case plans and **reports of contact must be current in each case record.** (Emphasis added).

...

PROCEDURE:

...

F. Page 6: Case History - file chronologically:

i. OCS Forms:

- Case Assessment (06-9705)
- Form Letter for Providing Feedback to Mandated Reporters (06-9708)
- **Report of Contact (ROC) (06-9690)** [Emphasis added]

Likewise, OCS P&P 6.8.2 Chronological Entries states:

### 6.8.2 CHRONOLOGICAL ENTRIES

**AUTHORITY:** AS 47.10.093 Disclosure of Agency Records, 7 AAC 54.010 Confidentiality of Client Records.

**PROCEDURE:** Prober<sup>3</sup> record keeping provides a clear account of the need for service and the division's response. It serves as a reminder and review for the worker, and it is the primary method of transmitting information from one worker to another. Records are necessary to assess treatment effectiveness and serve to meet the division's responsibility to be accountable for services.

The case record is the basic tool required to prepare and present a case for court. The worker should remember that every case of child abuse and/or neglect has the potential of going to court. Complete and proper records can also be an aid in defense in lawsuits against the agency and/or worker. For a child in custody, a case record may be the only written record of a child's life.

a. Case recording is maintained on the Reports of Contact (ROC) sheets and all reports and summaries should be as clear and concise as possible. Use the active versus the passive voice. Utilize simple prose, "I", or "this worker".

b. **Records are kept up to date. With the passage of time, details become foggy and essential details may be forgotten.** (Emphasis added).

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<sup>3</sup> Prober is the old OCS database. The agency now uses the ORCA database but hasn't updated this reference in OCS files.

By Ms. Fleming's own admission, she failed to comply with the requirements of documenting her contacts with the Grandfather in ORCA, OCS's computerized case management system. Likewise, according to the investigator's review of the OCS files, she did not fill out a Report of Contact form as required by the above policies. While Ms. Fleming did generate an e-mail to Ms. Sonner on April 23, 2008 summarizing her two contacts with the Grandfather, this did not occur until after the agency had been notified by the ombudsman investigator that the Grandfather had filed a complaint against their office. An e-mail summary generated several months after the fact cannot and will not be the most accurate recollection of the conversations that took place with the Grandfather. The intention of these two policies is to provide a contemporaneous record of contacts with persons who contact OCS staff during the course of the child protective proceedings. While Ms. Fleming may have felt her contacts with the Grandfather were contentious, this was not an appropriate basis to ignore the record keeping requirements of OCS's policies and procedures and in fact might have provided the agency valuable insight into the information provided by the Complainant.

Therefore, the ombudsman finds the allegation justified.

### **OCS Response to Allegation 7 Finding**

**OCS Response:** OCS did not dispute the findings of allegation 7.

**Law Response:** Law did not respond to the findings of allegation 7 as they were directed at OCS.

OCS did not dispute the ombudsman's proposed finding in Allegation 7, therefore this allegation will be closed as justified.

\* \* \*

***Allegation 8: Unfair: OCS failed to notify a grandparent about a scheduled OCS conference concerning their grandchild, where the grandparent expressed a desire to participate in the placement decision process.***

One of the Grandfather's primary complaints was that OCS failed to communicate with him on a regular basis and keep him informed of his grandchild's case progress. He did not find out that his grandchild had been reunited with her father until he contacted OCS supervisor Sharon Fleming on January 22, 2008, two months after the fact. He complained that he had no part in the placement decision discussion prior to reunification.

### **Standards applicable to Allegation 8**

The Office of the Ombudsman's Policies and Procedures Manual at 4040(3) discusses and defines *unfair* as in Allegation 2:

The investigator reviewed OCS P&P's 4.1, 3.1.2, and 6.6.3 during investigation of this allegation.

**OCS Policy 4.1 Family and Children Conferences** states in relevant part:

a. All children and families with open cases will be reviewed at child and family conferences at appropriate times throughout the time it is open, as indicated in this section. The purpose of the division's case conferencing system is to ensure that children's situations are reviewed in a timely and consistent manner, to ensure that decisions are based on the best interests of the child, address the health and safety of the child, and expedite permanency for the child. This intent is facilitated by involving applicable parties in the process. Conferences differ in the specific purpose of the conference, the participants, and the content depending on the length of time the child has been in custody.

...

b.1. Family and Children Early Conference is held within 90 days of the probable cause finding for all children who are in custody and in out-of-home placement. The purpose is to assist in meeting the statutory requirements:

- for the timelines for permanency and concurrent planning,
- for notifying parents of timelines for permanency,
- for providing services to families,
- for identifying potential barriers that may hinder service provisions to families, and
- for children not to linger in the system. (see section 3.1.2 Family and Children Early Conference for additional information)

Also applicable is **OCS P&P 3.1.2 Family and Children Early Conference** which provides as follows:

**PURPOSE:** To review the current status of the case plan, ensure that families' needs have been assessed and that the appropriate services are in place, and to review progress.

**POLICY:** OCS will hold a Family and Children Early Conference within 90 days of the probable cause finding for all children who are in custody and in out-of-home placement. Each region will have designated review facilitators. All parties attending will have an opportunity to share pertinent information.

**PROCEDURE:**

- a. Invite the following persons to participate in the conference:
  1. Parents and/or Indian custodian;
  2. Child if age and developmentally appropriate;
  3. Worker;
  4. Supervisor;
  5. Team caseworkers;
  6. GAL/CASA;
  7. Tribal representative (for Native children);
  8. Regional ICWA Specialist (for Native children);
  9. Foster parents or other care providers;

10. Regional Adoption Specialist (for the following types of cases):

- when reasonable efforts are not required under AS 47.10.086(c); and
- any case the supervisor deems appropriate.

**b. Optional invitation (at the worker's discretion):**

1. Attorneys;
2. AG; Assistant Attorney Generals;
3. Service providers (including mental health, medical, and educational);
4. **Extended family** (address confidentiality issue at the beginning of the review);
5. Multi-Disciplinary Team member (from investigation);
6. Investigation worker (see section 6.6.1 Intrastate Case Transfers)

c. Notification: See section 6.6.3 Notification of Court Hearings and Case Conferences. [Emphasis added]

OCS's policy and procedures manual section **6.6.3 Notification of Court Hearings and Case Conferences**<sup>4</sup> requires that a designated OCS administrative clerk provide written notice to a child's grandparents of court hearings and case conferences.

**POLICY: Notification of court hearings and case conferences** will be provided in a timely manner to the parties to the case (i.e. parents, guardian ad litem, and tribes or Indian custodians intervening in the case), tribes or Indian custodians not intervening in the case, foster parents, relative caregivers, **and the child's grandparents.** [Emphasis added]

## **Ombudsman Analysis of Allegation 8**

The ombudsman investigator determined after reviewing the agency's file that a Family and Children Early Conference (FACE) was held on December 19, 2007. According to an activity note entered by OCS Supervisor Natalie Powers on November 30, 2007, notice of this conference was provided to all parties by OCS. This included the parents, the CASA, the GAL, and the foster parent. However, the Grandfather was not notified of this conference, according to a review of OCS's file. OCS did not document the reason why OCS did not notify the Grandfather and his wife of this conference.

According to Ms. Pietz's notes, visitation between the Grandchild and Father was going well and occurring on a daily basis. The Mother's visitation with her child was inconsistent. Ms. Pietz's notes stated that the goal for the Grandchild was reunification with her father and that this goal was supported by the CASA, the GAL, and the mother.

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<sup>4</sup> **POLICY: Notification of court hearings and case conferences** will be provided in a timely manner to the parties to the case (i.e. parents, guardian ad litem, and tribes or Indian custodians intervening in the case), tribes or Indian custodians not intervening in the case, foster parents, relative caregivers, **and the child's grandparents.** [Emphasis added]

The next court hearing date of January 24, 2008 was discussed during this conference according to Ms. Pietz's notes.

The Grandfather told the investigator that the only notice he received was the August 30, 2007, Notice to Grandparents sent to him by the Attorney General's office. The investigator reviewed OCS's files and could find no evidence to the contrary.

A review of OCS's policy on this allegation indicates that the caseworker has discretion whether to invite extended family members to the FACE conference. However, one of the issues that the Grandfather complained about was the overall lack of communication by OCS staff throughout the course of the CINA case concerning the care and custody of his Grandchild. He said that he first heard that his grandchild had been reunified with the Father during his January 22, 2008 conversation with Ms. Fleming, two days before the pre-trial hearing. Ms. Fleming's April 23, 2008 e-mail to Ritchie Sonner confirms this.

One of the stated purposes of the family conference is to provide an opportunity for the parties to share information. The conferences ensure that decisions are based on the best interests of the child and address the health and safety of the child. Although the Grandfather was not a party and his participation at this conference may not have resulted in a different outcome, the failure of OCS to invite him to the conference denied the Grandfather an opportunity to express his concerns about the welfare of his grandchild before the child went to live with her father. The decision to exclude him from this process was unfair given his obvious concerns for his grandchild's welfare. Had he been able to attend, he would have been informed at this meeting that the agency's plan was to reunify with the father and that visitation had been going very well. Instead, the Grandfather learned that his grandchild was living with the Father during his telephone conversation with Ms. Fleming on January 22, 2008, a call that the Grandfather initiated. He was understandably upset that no one from OCS had told him this before he called the agency. While the Grandfather's participation at this family conference would likely not have entirely alleviated his concerns about his grandchild's welfare, at the very least he would have been informed of OCS's decision to pursue reunification with the Grandchild's father and perhaps some of his concerns could have been addressed at this conference.

Although OCS clearly has discretion whether to invite extended family members to FACE conferences, it is the ombudsman's conclusion that OCS's decision not to notify and include the Grandfather was unfair given his expressed concerns for his grandchild's welfare. Because the Grandfather was not given an adequate opportunity to be heard in a decision concerning the placement of his grandchild, the ombudsman finds the allegation *justified*.

### **OCS response to Allegation 8 Finding**

**OCS Response:** OCS did not dispute the findings of allegation 8.

**Law Response:** Law did not respond to the findings of allegation 8 as they were directed at OCS.

OCS did not dispute the finding in Allegation 8, therefore the ombudsman will close this allegation as *justified*.

## RECOMMENDATIONS

Although both OCS and the AG's office appeared to characterize the Grandfather's situation as "a calamity of errors" or an isolated incident, the ombudsman investigation revealed that the failure of OCS staff to consistently provide written notice to grandparents and other interested persons has been a long-standing issue.

During the investigation, the investigator reviewed several reports that have been generated by organizations such as the Citizen's Review Panel, Alaska Court System, and the U.S. Department of Health and Human Services' Federal Child and Family Services Review. These publications identified on-going concerns with OCS's efforts to notify relatives and other persons required to be notified of court hearings.

In addition to the present investigation, the ombudsman has received several complaints in other OCS cases raising similar allegations:

- (1) failure to provide written notice of CINA hearings to grandparents, foster parents, and biological parents as required by law;
- (2) failure to provide written notice concerning relative placement requests as required by law and policy; and
- (3) failure to notify a parent in writing of a placement move as required by law and policy.

These cases indicate a systemic problem: OCS repeatedly fails to follow the statutorily required procedures requiring written notice to parties, relatives, and other persons required to be noticed during CINA proceedings. The ombudsman did not issue reports in each of these cases because the issue was rectified with the agency after ombudsman involvement. However, they are important in the context of this recommendation to show that OCS's failure to provide adequate notice to the Grandfather was not an isolated error. The issue of notice requirements needs to be addressed by training throughout the agency.

### Summaries of OCS Complaints Relating to Lack of Notice

Ombudsman staff reviewed the Ombudsman Caseload Management System complaint database from 2004 to June 2010 to find complaints about the failure of OCS to notify parties to CINA cases. The following cases are examples of instances where the complainant presented lack of notice as an issue.

**A2004-1101** Allegation: Contrary to law: OCS is violating requirements of the Indian Child Welfare Act by failing to notify the tribe of scheduled hearings in a CINA case.

*Summary:* The maternal great-aunt of two children in OCS custody contacted the ombudsman to complain that OCS was not complying with the statutory requirements of the Indian Child Welfare Act (ICWA). Specifically, the complainant alleged that OCS had failed to notify a tribe of scheduled CINA hearings and had not actively considered tribal family members for placement.

A review of OCS's files evidenced that the tribe was notified of court hearings and the tribe's attendance at case conferences and Team Decision Making (TDM) meetings indicate the tribe received notice of these meetings. However, one TDM meeting was held that no one attended. After the ombudsman contacted the OCS

supervisor, another TDM was scheduled. The ombudsman determined that OCS failed to notify the parties of the rescheduled TDM as well. Further ombudsman contact with the OCS supervisor resulted in the case being transferred to a more experienced worker, the rescheduling of another TDM, and the termination of the previous caseworker.

In the end, the complainant in this case finally received placement of the two children and subsequently, OCS approved their adoption by the complainant.

**A2007-1544** Allegation: Contrary to law: OCS did not notify a non-custodial parent of the removal of their child from the custodial parent for two weeks.

**Summary:** AS 47.10.142(c) requires that when OCS takes a child into custody, the department shall immediately, and in no event more than 24 hours later unless prevented by lack of communication facilities, notify the parents or the person or persons having custody of the child.

Under AS 47.10.142(c), OCS failed to timely notify the non-custodial parent that the agency had taken emergency custody of the children. Investigation revealed that it took the caseworker five days to notify the Department of Law of the father's contact information emergency removal, and that this delay contributed to the AG not immediately notifying the father as required by law.

The caseworker stated to the ombudsman that she did not have the father's contact information to provide to the Attorney General at the time OCS took the children into emergency custody. However, she admitted that she was relatively new at the time the report of harm was received and was unaware of a date-restricted button in ORCA. The investigation revealed that if the caseworker had clicked on the date-restricted button in ORCA, it would have revealed the father's contact information from an earlier report of harm and the caseworker would have had this information immediately to provide to Law.

It also was not clear to the investigator why the caseworker was not able to locate the father's contact information through other court records. After the caseworker provided the father's contact information to Law, the Assistant Attorney General took immediate action to notify the father of the emergency removal.

**A2008-0759** Allegation: Contrary to law: OCS did not provide a grandparent with written notice of scheduled CINA hearings as required by AS 47.10.030(d).

**Summary:** The complainant is the maternal grandmother of two children in OCS custody. She contacted the ombudsman to complain that OCS had not provided her written notice explaining the reason OCS terminated her visits with her grandchildren.

In February 2008, the court ordered that OCS provide one hour per week visitation to the grandmother. On April 15, 2008, the grandmother had a verbal altercation with the OCS social worker during a visitation. On April 24, 2008, OCS sent a Report to the Court to inform the court that OCS had cancelled further visitations between the grandmother and her grandchildren due to her destructive behaviors. The complainant said she had contacted OCS and asked for a written explanation why the visitations had been cancelled. It is not clear when she asked

for the letter. She contacted the ombudsman on May 12, 2008. An OCS staff manager confirmed that OCS mailed the complainant the requested letter May 12, 2008.

However, OCS did not provide the grandmother a copy of the report to the court concerning her cancelled visits. The reason given was that she is not party to the case, and therefore not entitled to a copy of the report to the court.

The investigator also determined that OCS failed to notify the complainant in writing of court hearings in this case. According to OCS manual 6.6.3, Notification of Court Hearings and Case Conferences, a designated OCS administrative clerk will provide written notice at least 10 days prior to the schedule date of hearings, except for emergency hearings, to the child's grandparents. When requested by the investigator to provide copies of written notification of the hearings, the OCS supervisor responded that the grandmother was verbally noticed of the court hearings, attended the hearings, and therefore was aware of the scheduling. The investigator determined that the grandmother attended three of the seven scheduled hearings. However, the law requires that OCS provide written notice of the hearings to the grandparent, not verbal notification.

**A2008-0769** Allegation: OCS unreasonably failed to provide timely notice of a guardianship hearing to a licensed relative foster parent who had placement of her nephew. As a result, the foster parent was unaware that the hearing had been scheduled and was unable to attend and participate at the hearing.

*Summary:* The investigator contacted OCS, the Attorney General's Office, and the Alaska Court System in responding to the complaint about failure to provide adequate notice of the guardianship hearing. The investigator determined that the Attorney General's office was responsible for providing written notice 14 days in advance to the complainant and all case parties. However, due to clerical and administrative error, the complainant did not receive adequate and timely notice, and was unable to participate at the hearing.

**A2008-1092** Allegation: Contrary to law: OCS failed to provide written notice of permanency hearing to a foster parent. As a result, the foster parent was unable to attend or participate in the hearing and express her concerns to the agency about reunifying with the child's biological mother.

*Summary:* The investigator presented the agency with the evidence. The agency admitted the error and agreed to work with the ombudsman to find solutions to prevent this error from occurring in the future. The supervisor attributed the error to staff turnover and lack of communication concerning the requirements with new staff who filled an administrative clerk's position.

**A2008-1338** Allegation: Contrary to law: OCS failed to provide written notice to a grandparent that their request for placement of their grandson had been denied and provided no information on the grandparent's right to appeal this decision.

*Summary:* Two ombudsman investigators discussed the case in a September 16, 2008, teleconference with the caseworker involved and her supervisor. The

caseworker contended she had met the notice requirement when she informed the complainant verbally some time earlier that she would not be considered for placement. The supervisor, however, informed the social worker that the ombudsman's reading of the statute requiring formal notice was correct. The supervisor agreed that the notice also informs the recipient of the right and proper manner to appeal the denial, a step the social worker had not mentioned to the grandparent, making her verbal "notice" doubly deficient.

The worker sent a Denial of Placement notice to the grandparent dated October 3, 2008, almost three weeks after the teleconference. The notice was deficient, however, in that it did not specify the reasons for denial as required by statute. The ombudsman investigator informed the social worker and supervisor of the notice's fatal flaw; the supervisor agreed the notice should be rewritten and delivered again.

The caseworker did not send the amended notice until December 1, 2008. The grandparent convinced Alaska Legal Services to represent her to contest her exclusion. In May 2009 the grandmother prevailed following a lengthy hearing that concluded with a Superior Court judge ordering her grandson placed with her. The State did not intend to appeal the ruling, according to the OCS supervisor. A new worker was assigned to the case. However, the child started missing school and causing disruptions when he attended, culminating in the grandmother assaulting a school official. OCS immediately moved the child to foster care, a move the grandmother did not oppose because OCS signed an agreement promising to notify her of permanency case plans for the child.

**A2008-1360** Allegation: Contrary to law: OCS did not provide written notice to a parent concerning a change of foster placement as required by OCS's policy and procedures.

*Summary:* OCS removed a child from foster placement on March 20, 2008. OCS considered it an emergency placement because the foster parent requested that child be removed immediately.

**AS 47.10.080(s).** Judgments and Orders states that:

The department may transfer a child, in the child's best interests, from one placement setting to another, and the child, the child's parents or guardian, the child's foster parents or out-of-home caregiver, the child's guardian ad litem, the child's attorney, and the child's tribe are entitled to advance notice of a **non-emergency transfer**. A party opposed to the proposed transfer may request a hearing and must prove by clear and convincing evidence that the transfer would be contrary to the best interests of the child for the court to deny the transfer. A foster parent or out-of-home caregiver who requests a nonemergency change in placement of the child shall provide the department with reasonable advance notice of the requested change.

The statute states that a parent is entitled to advance notice of a non-emergency transfer. It is silent regarding an emergency transfer. However, OCS addresses notice on emergency transfers in their policies and procedures manual.

**CPS Manual Section 3.7**, Change or Termination of a Placement/Trial Home Visit/Return Home, Procedure, states:

B.5. Placement Changes: The worker will use the following guidelines when a child's placement is changed. For emergency transfers, the worker will notify the parties by sending out a Notice of Emergency Transfer (06-9761), and will make every effort to provide notification no later than five working days following the removal.

The investigator determined that the caseworker provided *verbal* notice of the transfer to the mother. However, the investigator confirmed that OCS did not provide *written* notice to the child's mother as required by CPS section 3.7.B.5. The caseworker's explanation for failing to comply with OCS's written policy and procedures was that the time frame was shortened because the foster parents wanted the child removed immediately. OCS never sent a written Notice of Emergency Transfer as required by policy.

**J2008-0309** Allegation: Performed Inefficiently: OCS failed to respond timely to a grandparent's request to have grandchildren placed with her.

**Summary:** A grandparent requested placement of her grandchildren and alleged that the OCS worker had not timely responded to her repeated requests. The investigator contacted the OCS caseworker and determined that the denial, while verbally given to the complainant, was never put in writing as required by Alaska law and the agency's policies. The investigator suggested that the denial of placement be put in writing to the complainant. The OCS caseworker agreed with this recommendation and denied the relative placement request in writing as required by law. Because the reasons given by the agency for denying placement appeared reasonable and there was a process available for the court to review the placement decision, the complaint was closed.

**A2009-0304** Allegation 1: Contrary to law: OCS will not provide a grandparent with written notice denying her relative placement request as required by law and agency policy.

Allegation 2: Unreasonable: OCS delayed providing a relative with a written decision denying a placement request for several months without justification.

**Summary:** A grandparent requested placement of her grandson and alleged that the assigned OCS worker would not make a decision on her request, despite repeated attempts to get a decision. The investigator contacted the OCS caseworker who said that a decision had not been made yet, but that the request had not been denied. She further stated that she needed to determine if placement with the grandmother was in the child's best interest before a decision could be made. Later, this OCS caseworker resigned from OCS without making a decision. The case was reassigned to another worker. The new caseworker provided several reasons to the investigator why the grandmother was not a suitable placement for the child. However, despite a reminder that the law required that a decision in writing be provided to the complainant in a timely fashion, the caseworker did not follow through. After the investigator contacted the Regional Supervisor to

address this issue further, the caseworker notified the grandparent in writing that OCS denied their relative placement request and the complainant was advised to request judicial review of the decision.

**A2009-0691** Allegation: Contrary to law: OCS failed to provide advance written notice of Child in Need of Aid court hearings to the grandparent of a child in state custody as required by Alaska Statute.

*Summary:* On May 28, 2009, the Office of the Ombudsman received a complaint from a grandparent of a child in state custody. The complainant alleged that OCS had failed to provide her with written notice of the court hearings involving the grandchild.

The ombudsman investigation revealed that OCS did provide the complainant with verbal notice of the hearings. However, OCS failed to provide the complainant with advance written notice of all Child in Need of Aid court hearings involving her grandchild, as required by Alaska Statute.

In this case, the Attorney General's Office had provided the complainant with advance written notice of only two of the Child in Need of Aid court hearings.

OCS acknowledged its error and informed the ombudsman that the agency recognized the issue of grandparent notice was an area in which the agency needed to improve its performance.

**A2009-819 and A2009-821** Allegation: Contrary to law, OCS failed to provide foster parent advance written notice of court hearings.

*Summary:* The assigned caseworker responded to the allegation that OCS verbally notifies foster parents of court hearings. However, after she checked with a co-worker, she believed that the Attorney General sent a written notice to the foster parent.

The investigator discussed the issue with the staff manager. The staff manager conceded that the notice to the foster parent could have been verbal and conceded that the agency had a lot of discussion recently about notification, and who was responsible for compliance. She stated that the agency had recently scheduled an advanced legal training on this topic. She said that the worker might not have been aware of this requirement and that currently, it was the worker's responsibility to provide written notice to the foster parent.

**A2009-1157** Allegation: Contrary to law: OCS failed to provide advance written notice of Child in Need of Aid court hearing to the grandparent of a child in state custody as required by Alaska Statute.

*Summary:* OCS staff told the ombudsman intake officer the Attorney General's office sends written notice of court hearings to grandparents. The ombudsman intake officer contacted the Attorney General's office for further clarification. The AAG assigned to this CINA case responded that the Attorney General provides the initial notice to grandparents, but that OCS staff are required to provide all other written notices after the initial notice. However, according to the intake officer's review, OCS policy does not state this. Therefore, even the AAG's

statement of the procedure was not in line with “statewide policy” on written notice. In an earlier e-mail from the AAG, he stated that he was going to e-mail the information to the rest of his office and to OCS management staff. He wrote, “This is obviously something that is an office wide problem.”

According to the investigator’s review, the complainant did receive written notice of the court hearing at issue. The AAG provided the ombudsman investigator with a copy of the initial notice sent to the grandparent by registered mail, with proof of service. However, although the grandparent received the initial notice of hearing, it is unclear whether they will continue to receive future written notification of hearings, because both OCS and the AG’s office were unclear on each agency’s duties per the requirements of current OCS policy on grandparent notification.

Based on this sample of Ombudsman complaints, it is clear that OCS’s pattern of failing to notice persons who should receive notice, underscored by other reports critical of OCS reporting performance, requires immediate and agency-wide corrective action.

Therefore, the ombudsman proposed the following recommendations intended to prevent the likelihood of similar problems from occurring in future CINA cases:

\* \* \*

### **Recommendation 1: Agency Comment and Ombudsman Response**

***Recommendation 1: OCS should conduct additional training for all OCS staff regarding relevant statutes, regulations, policy and procedures on notice requirements. OCS should add to its training program a component on statutory notice requirements.***

During this investigation, the investigator questioned how OCS complies with the requirements of OCS Policy & Procedure 6.6.3 requiring that an OCS designated administrative clerk provide written notice to grandparents at least 10 days before the date of any scheduled hearings. Ms. Sonner, Regional Supervisor for the Southeast OCS office, stated that the practice varies depending on what office is responsible for doing it and whether there is clerical support available. In the Juneau field office, for example, the caseworker is responsible for generating and sending the notices. However, this is not the case in every OCS field office. Also, in some areas, the Attorney General’s office sends out the first written notice, and all other notices are the responsibility of OCS.

The ombudsman concludes that the lack of consistency in actual practice between the various offices leads to errors and has a negative effect on relatives of children in state custody. Therefore, the ombudsman recommends that OCS should review this policy with the Attorney General’s office further.

**OCS Response:** The agency implicitly accepted this recommendation and responded as follows:

Action Plan:

Over the past year there has been additional staff development activities going on to help improve our worker's understanding of statutes [sic] and policy for noticing. We have been piloting a centralized noticing process that we hope will improve the timeliness and standardization of this process for staff. This pilot has been occurring in Juneau and Anchorage for now with the hope that this will prove effective and can be moved statewide.

Additionally, OCS is currently working on developing a standardized "on the job" training curriculum that is designed to help guide new worker development. This curriculum will outline the activities they should be engaged in prior to attending new worker training, during the one month between their training, and post training. This will include orientating and meeting with the various legal parties for CINA cases. During this time the AAG's would have the opportunity to emphasize [sic] the importance of notices and outline the statutory requirements. This "OTJ" curriculum would be applied in all OCS field offices when new employees are hired.

**Ombudsman comments:** On July 6, 2010, the ombudsman investigator requested additional information from Ms. Lawton concerning the centralized noticing process and standardized "on the job" training curriculum proposed by the agency in an effort to remedy notification problems. Ms. Lawton indicated that OCS is in the process of conducting a pilot project with the Southeast and Anchorage OCS offices and provided the investigator with a handout containing information provided to participants. So far, approximately 70 OCS staff have participated in the project from both the Juneau and Anchorage OCS offices. According to the Southeast and Anchorage Pilot Process documentation, the purpose of the pilot program is to determine the feasibility of centralizing the notification process statewide or regionally. Although this handout appears to focus primarily on placement change and denial of placement notifications, there is reference on page four of the handout summarizing additional required notifications during a CINA case, including notice of hearings and court conferences to grandparents.

Ms. Lawton indicated that OCS is in the process of creating its first "draft" of the OTJ curriculum as part of Alaska's Child and Family Services Review Program Improvement Plan currently due for completion by the fifth quarter, or between December 5, 2010-February 28, 2011.

\* \* \*

## **Recommendation 2: Agency Comment and Ombudsman Response**

*Recommendation 2: OCS should review the relevant sections of its policies and procedures manual with the Attorney General's office regarding grandparent notice and revise it to accurately reflect the procedures that OCS staff must follow when serving written notice of court hearings, case conferences, and other related meetings to grandparents.*

**OCS Response:** The agency implicitly accepted this recommendation and responded as follows:

Action Plan:

OCS has a statewide policy workgroup that meets monthly to review and revise outdated and new policies. We have in the last (sic) also added a representative from the AG's office to partake in these meetings to ensure accuracy and statutory compliance. The addition of an AAG to the workgroup has helped to streamline the process and promote due diligence to accurate and current policy and procedures. The policy addressing notices is in the process of being revised and is expected to be issued in the Fall.

**Law's Response:** The agency implicitly accepted this recommendation and responded as follows:

Recommendation 2 indicates that the Office of Children's Services (OCS) should review the relevant sections of its policies and procedures manual with the Attorney General's Office regarding grandparent notices, and revise it to accurately reflect the procedures that OCS staff must follow when serving written notice of court hearings, case conferences, and other related meetings to grandparents. You will be pleased to know that the Attorney General's Office has already been working with the OCS Policy Re-write group over the past year. Specifically, an assistant attorney general has been involved in the drafting and editing of OCS policy as it pertains to legal aspects of a CINA case, including notice policies and procedures. The Attorney General's Office will continue to work with OCS on this endeavor. We request that the report acknowledge that this work is already underway.

\* \* \*

### **Recommendation 3: Agency Comment and Ombudsman Response**

*Recommendation 3: The Department of Law should be responsible for sending written notice of all CINA hearings to grandparents and other interested persons. OCS should continue with current policy and procedure requiring written notice of OCS conferences to parties, relatives and other interested persons.*

**OCS Response:** The agency implicitly accepted this recommendation and responded as follows:

Action Plan:

OCS is statutorily required and responsible for the notification of all CINA hearings to grandparents and other interested persons. OCS and the [Law ] are considering the benefits of having notices be sent (sic) from their office, but this would require a statutory change. This change is on the list for consideration in the coming year. In the meantime, OCS will continue its efforts to improve the process we have internally.

**Law's Response:** The Attorney General rejected this recommendation and responded as follows in part:

The Department of Law sends out initial notifications to grandparents of the pending CINA proceedings according to AS 47.10.030(b). The notice has to contain specific information and comply with the Alaska Rules of Procedure for the service of process. It is the Department of Health and Social Services, not the Department of Law, which is statutorily charged with the responsibility of providing written notice to grandparents and foster parents for subsequent hearings. Subsequent hearings are governed by AS 47.10.030(d) and AS 47.10.070. . .

In order to shift the responsibility from the Department of Health and Social Services, to the Department of Law, a statutory change should occur.

In addition, the report suggested that the Department of Law be responsible for sending notices to "other interested persons". There is no statutory authority for sending notice of the confidential CINA proceedings to entities other than those listed in AS 47.10.070. Regardless of who is sending the notice, "other interested persons" are not entitled to notice.

**Ombudsman comments:** The ombudsman agrees that recommendation 3 should be refined. Any reference to "other interested persons" in Recommendation 2 and 3 was intended to refer to those persons who are required by statute to be notified in writing of CINA proceedings, i.e. foster parents, tribal representatives, not to imply that either OCS or Law should be responsible for sending notices to entities other than those persons already required by statute to be notified. Accordingly, recommendation 3 will be modified as follows:

### **Revised Recommendation 3 and Ombudsman Commentary**

***Recommendation 3: The Department of Law should be responsible for sending written notice of all CINA hearings to grandparents and other persons entitled to notice. OCS should continue with current policy and procedure requiring written notice of OCS conferences to parties, relatives and other persons entitled to notice.***

According to AS 47.10.030(d), DHSS is required to give advanced written notice of all court hearings to a child's grandparent after filing a CINA petition with the court, not only for any subsequent hearings that may take place after the initial hearing as suggested by Law. Further, AS 47.10.030(b) does not require Law to send out the initial notification to grandparents of pending CINA proceedings, although this appears to be the current practice.

According to a plain reading of the statute, under AS 47.10.070 (a), DHSS, not Law, is the agency required by statute to send notice of the initial hearing after the filing of a CINA petition to a child's grandparents. Under AS 47.10.070(e), grandparents may attend hearings that are otherwise closed to the public under subpart (c). This includes the initial court hearing after the filing of a petition to commence the CINA case per AS 47.10.070(c). According to Ms. Raymond's

response, Law has interpreted AS 47.10.030 (b) as requiring Law to send out the initial notice of proceedings to grandparents, instead of DHSS, because the process for doing so requires service of the initial notice according to the Alaska Rules of Civil Procedure.

In essence, although the current statutes do not require that Law be responsible for sending grandparents the initial notice, the AG has taken on this responsibility as the legal representative for DHSS, recognizing the importance of proper service of process. Accordingly, the ombudsman questions whether further statutory revisions are required in order for Law to assume the responsibility of sending out all subsequent required notices to grandparents, because they have already assumed the responsibility of sending out the initial notice when the statutes do not require that they do so.

Because the Attorney General's office recognizes the significance in complying with the statutory notice requirements and because its current practice entails sending written notice of the initial hearing to grandparents already despite no requirement in statute that they do so, it would be more efficient to continue with this practice for all subsequent hearings scheduled during the course of a CINA case.

Despite the fact that a grandparent's contact information is needed to send out the notices and this information is generally in the control of OCS and the individual worker, Law has apparently been able to get this information from OCS in assuming the responsibility of sending out the initial hearing notice in many instances. It does not make sense why Law cannot continue with this process throughout the course of the CINA proceedings. Law also has access to ORCA, OCS's case management system software. Conceivably, Law could also access a grandparent's contact information by simply reviewing the information contained within ORCA, assuming that OCS has correctly entered the grandparent's contact information.

The ombudsman acknowledges and appreciates Law's clarification of the Department's responsibility to send notices of hearings to parties during a CINA case. Revisions to OCS policy 6.6.3 will help to further clarify this, as in its current form, this policy indicates that Law is responsible for notification of all court hearings to the parties, except informal notice of the emergency hearing, delegated to the responsibility of OCS.

\* \* \*

#### **Recommendation 4: Agency Comment and Ombudsman Response**

*Recommendation 4: OCS invested a great deal of time and money to bring the ORCA case management system to Alaska. The agency should reinforce with caseworkers that the system is not only a records-keeping tool but a tool to help save time in routine tasks – such as drafting notice letters to case parties. Now that OCS has had the ORCA system for a while, caseworkers should be reminded and perhaps retrained in using the ORCA labor saving functions.*

Ombudsman investigators have received training on the OCS ORCA system and learned that the system allows caseworkers to draft notice letters from ORCA templates with relatively few keystrokes and little time.

**OCS Response:** The agency implicitly accepted this recommendation and responded as follows:

Action Plan:

ORCA is a comprehensive case management system that does provide for many time saving functions. Over the last year, there has been work in designing the functionality that would allow workers to create the notice letters within ORCA, instead of outside ORCA as they currently do, that will save worker time overall. ORCA is only as good as the information that gets entered. Case documentation entries at all levels is a continual area of growth for the agency as worker's struggle with the expectations of being in the field seeing families and for having a multitude of documentation requirements kept current. We are always evaluating ways to help workers do this critical piece of their work more efficiently. The changes with noticing are expected to be available with a new release in September. A revised policy regarding noticing that helps to clarify and emphasis [sic] the importance of noticing is also scheduled to be issued to coincide with the changes to ORCA in the fall. OCS believes that the combination of these two efforts will improve our compliance with the statutory requirements for noticing grandparents and others.

Law's reply to the ombudsman's preliminary report also addressed the lack of clear procedures for telephonic participation by non-parties in CINA proceedings.

**Law response:** . . . the report should acknowledge that non-party telephonic participation in Child in Need of Aid cases is a systemic issue that needs to be addressed. There is no requirement in AS 47.10.030(d) that the written notice to grandparents include a mechanism on how to participate telephonically. To the extent that phone numbers and instructions are provided, they are given with the intent of encouraging participation by those entitled to receive notice. The report acknowledges that there are relaxed procedures for CINA cases for parties to participate telephonically and that the requirements of Rule 99 are not strictly followed. . . Unfortunately, under the current procedures in the Juneau court, it is not clear whose responsibility it is to alert the court that a non-party would like to participate telephonically.

Additionally the way courts allow or facilitate telephonic participation differs depending on location. For example, some Anchorage judges ask the parties if anyone is aware of a person needing to present telephonically. The in-court clerk will often then place the call using the number provided by the parties. In the Bethel region, parties call into established "meet-me" telephone lines and the court will either open the line itself, or will ask parties if anyone is expected to be on the phone. . .

. . . Problems such as this could be greatly reduced in the future by guidelines that outline clear procedures for the telephonic participation of non-parties in CINA

proceedings. Perhaps the remedy lies in a change to Civil Rule 99 or the creation of a CINA rule specific to this issue. All parties, including the court, should review their practices to avoid such unfortunate incidents from happening in the future.

**Ombudsman comments:** The ombudsman agrees with Law’s concerns regarding the lack of clear procedures for telephonic participation by non-parties in CINA proceedings. Accordingly, the ombudsman proposes the additional recommendation to both Law and OCS in response to Law’s request that the ombudsman report acknowledge that this is a systemic issue:

\* \* \*

### **Recommendation 5: Agency Comment and Ombudsman Response**

*Recommendation 5: Law and OCS should collaborate with members of the Alaska Court System CINA Court Improvement Committee and the Alaska Legislature for proposed changes to the Alaska Rules of Court and Alaska Statutes to ensure there are clearer and consistent procedures in place for the telephonic participation of non-parties in CINA proceedings.*

The Alaska Court System’s CINA Court Improvement Committee monitors and improves the way the court system handles child in need of aid cases, and improves coordination between the court system and other agencies and Tribes involved in CINA cases.<sup>5</sup> Members of the committee are appointed by the Chief Justice of the Alaska Supreme Court and includes judges, the Director for OCS, tribal representatives, and other state agencies, including the Department of Law, the Public Defender Agency, the Office of Public Advocacy and the Division of Behavioral Health. Both Law and OCS are members of this committee. The two agencies have the opportunity to request that this topic be addressed with other committee members at an upcoming meeting to determine what changes to the current court rules might be appropriate to ensure that there are clear procedures for the telephonic participation of non-parties in CINA proceedings. Proposed changes could be forwarded to the Alaska Supreme Court for consideration.

The ombudsman investigator contacted Ms. Susanne DiPietro, Court Improvement Project Coordinator for the Alaska Court System, for information on how this topic might be addressed by the committee. Ms. DiPietro indicated that the CIP agenda is set after consultation with the co-chairs and that the Court Improvement Project considers issues raised by any member of the Project group. She also indicated that if the ombudsman made a suggestion or recommendation on this topic for the committee’s consideration, it would be addressed through the proper channels, whether through the Project, the Civil Rules Committee, the Administrative Rules Committee, or a combination of those. Accordingly, the ombudsman will provide a copy of the public version of this report to Ms. DiPietro for further consideration of this recommendation.

As an alternative, Law and OCS could request that the Alaska Legislature make changes to the court’s procedural rules or Alaska statutes to establish clear procedures regarding

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<sup>5</sup> <http://courts.alaska.gov/cina-cic.htm> (July 23, 2010)

telephonic participation of non-parties in CINA proceedings. While most Alaska court rules are enacted and amended by Supreme Court order, the Alaska Legislature may also change the court's procedural rules by passing an act expressing its intent to do so by a two-thirds majority of both houses. The ombudsman recommends that the agencies consult with the Alaska Legislature further on this issue.

The ombudsman also will provide a copy of the redacted investigative finding to the House and Senate Health and Social Services Committees.

## **CONCLUSION**

### **Finding of Record on Allegations Against OCS**

The ombudsman closed this investigation against OCS as a *justified* complaint. The agency is in the process of implementing a centralized noticing process that may prevent notification problems from recurring, as well as is working with Law to revise its policies concerning notification, and therefore the complaint against OCS is deemed *partially rectified*.

### **Finding of Record on Allegations Against Law**

The ombudsman closed this investigation against Law as a *partially justified* complaint, based on a justified finding for allegation 4, unsupported findings for allegations 3 and 6, and indeterminate finding for allegation 5. A partially justified finding is appropriate in a complaint having multiple allegations where at least one allegation is found justified and at least one allegation unsupported or indeterminate. Despite Law's request that the finding in Allegation 4 be modified, which the ombudsman declined to do, Law acknowledged that there was another systemic issue to be addressed: non-party telephonic participation in CINA proceedings. Because Law recognizes the lack of clear procedures is a problem, the ombudsman presumes Law will also agree with the recommendation they address the issue further with the CINA Court Improvement Project Committee and the Alaska Legislature. Further, Law indicated that it is in the process of working with OCS to revise OCS's policies on notification. Because the collaborative effort between OCS and Law may prevent similar problems from recurring, the complaint against Law is deemed *partially rectified*.

It is the ombudsman's practice to contact agencies several months after the agency commits to a course of action to determine how the ombudsman's recommendations have been enacted. The ombudsman routinely reports to the Legislature on how agencies have implemented recommendations.

## **APPENDIX A - Pertinent Statutes, Regulations & Policies**

AS 11.56.200. Perjury.

AS 11.56.230. Perjury by inconsistent statements.

AS 47.10.030. Summons and custody of minor.

AS 47.10.070. Hearings.

AS 47.10.080. Judgments and orders.

AS 47.10.142. Emergency custody and temporary placement hearing.

Alaska Rules of Court, Child In Need of Aid (CINA) Rule 2(l) Definition of “party.”

Alaska Rules of Court, CINA Rule 3(a) Hearings. Notice.

Alaska Rules of Court, CINA Rule 3(c) Presence of Grandparent or Out-of-Home Care Provider.

Alaska Rules of Court, CINA Rule 3(g) Telephonic Participation.

Alaska Rules of Court, CINA Rule 13. Pre-trial Conference and Meeting of Parties.

Alaska Rules of Court, Civil Rule 5. Service and Filing of Pleadings and Other Papers.

Alaska Rules of Court, Civil Rule 95. Penalties.

Alaska Rules of Court, Civil Rule 99(b) Telephonic Participation in Civil Cases.

Alaska Rules of Court, Administrative Rule 48. Telephonic Hearing Costs.

Alaska Rules of Court, Alaska Rules of Professional Conduct 4.1 Truthfulness in Statements to Others.

Alaska Rules of Court, Alaska Rules of Professional Conduct 4.4 Respect for Rights of Third Persons.

OCS Policy and Procedure (P&P) 3.1.2 Family and Children Early Conference.

OCS P&P 4.1 Family and Children Conferences.

OCS P&P 6.6.3. Notification of Court Hearings and Case Conferences.

OCS P&P 6.8.1 Case Records.

OCS P&P 6.8.2 Chronological Entries.

## APPENDIX B – Articles Reviewed by Investigator

- *Evaluating the Court Process for Alaska's Children in Need of Aid*, Susan DiPietro, Judicial Education Coordinator, Alaska Court System (February 20, 2006);
- *From the Benches and Trenches: Evaluating the Court Process for Alaska's Children in Need of Aid*, by Susan DiPietro, *The Justice System Journal*, Vol. 29, Number 2 (2008);
- *Children in Alaska's Courts: Report on Regional Recommendations*, Children's Justice Community Roundtables & Public Forums (April 2005);
- *Alaska Child and Family Services Review* by the U.S. Department of Health and Human Services (September 2002);
- *Alaska Child and Family Services Review* by the U.S. Department of Health and Human Services (February 2009);
- *State of Alaska OCS Title IV-E Program Improvement Plan* (March 20, 2007);
- *Child and Family Services Review Alaska Statewide Assessment*, Alaska Department of Health & Social Services, Office of Children's Services (July 2008);
- *Alaska Citizen Review Panel 2008 Report*, Alaska Citizen Review Panel (2008);
- *Alaska Citizen Review Panel 2008 OCS Response*, Tammy Sandoval, Director (2008);
- *Alaska Citizen Review Panel 2009 Report*, Alaska Citizen Review Panel (2009);
- *Alaska Citizen Review Panel 2009 OCS Response*, Tammy Sandoval, Director (2009);
- *A Guide to Child Protective Services for Relatives* (Office of Children's Services, August 2007);
- *Unlicensed Relative Caregiver Survey*, Alaska Department of Health & Social Services, Office of Children's Services (2008);
- *Judicial Community Survey Report*, Alaska Department of Health & Social Services, Office of Children's Services (2008).

## Appendix C – OCS Notification Process



Notification Process  
ARO and SERO - May

**Redacted Public Report**